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In The

Supreme Court of the United States

October Term, 1997

ELOISE ANDERSON, as Director of the California Department of Social Services; and the CALIFORNIA DEPARTMENT OF SOCIAL SERVICES,

Petitioners,

v.

CAPITOLA LAND, MARIA LOPEZ and JEAN MCCRUMBY,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal Of California, Second Appellate District

PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN,
Attorney General of California
CHARLTON G. HOLLAND III,
Assistant Attorney General
JOHN H. SANDERS,
Supervising Deputy
Attorney General
*ROBIN T. GERTLER,
CA Bar. No. 128413
Deputy Attorney General

300 S. Spring Street, Room 500
Los Angeles, California 90013
Telephone: (213) 897-2439

Counsel for Petitioners

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

1. Is a California regulation consistent with 42 U.S.C. § 672(a)(4) when it requires that, for a child to be eligible for the Aid to Families with Dependent Children-Foster Care Program, the child must have lived with the parent or relative for six months before the child is removed from such parent or relative by voluntary placement or the initiation of a removal petition?

TABLE OF CONTENTS

Page

OPINIONS AND ORDERS BELOW 1

JURISDICTION 2

RELEVANT STATUTORY AND REGULATORY PROVISIONS 2

STATEMENT OF THE CASE 5

1. The AFDC-FC Program 5

2. The Land, Lopez, & McCrumby Litigation.... 7

3. California Court of Appeal Proceedings 8

4. Denial of Review by the California Supreme Court 9

REASONS FOR GRANTING THE WRIT 10

I CERTIORARI SHOULD BE GRANTED BECAUSE THE CALIFORNIA COURT OF APPEAL'S DECISION IS CONTRARY TO THE PLAIN LANGUAGE OF 42 U.S.C. § 672(a)(4) 10

II THE LEGISLATIVE HISTORY BEHIND 42 U.S.C. § 672(a)(4) DOES NOT SUPPORT THE COURT OF APPEAL'S INTERPRETATION.. 16

III FEDERAL AFDC POLICY SUPPORTS CALIFORNIA'S ENACTMENT AND ENFORCEMENT OF THE LINKAGE REQUIREMENT .. 21

TABLE OF CONTENTS

Page

IV THE CALIFORNIA COURT OF APPEAL'S DECISION IMPOSES A POTENTIALLY DEVASTATING FISCAL IMPACT ON THE STATE OF CALIFORNIA AND ON THE VARIOUS COUNTIES THROUGHOUT THE STATE 24

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

CASES

Alaska v. American Can Co.,
358 U.S. 224 (1959) 25

American Federation of Musicians v. Wittstein,
379 U.S. 171 (1964) 25

Chevron, USA, Inc. v. Natural Res. Def. Council,
467 U.S. 837 (1984) 23

Illinois v. Gates,
462 U.S. 213 (1983) 10

King v. McMahon,
186 Cal. App. 3d 648 (1986) 5, 14, 24

Miller v. Youkim,
440 U.S. 125 (1979) 14

New York Dept. of Social Services v. Dublino,
413 U.S. 405 (1973) 23

Red Lion Broadcasting Co. v. FCC,
395 U.S. 369 (1969) 23

STATUTES

FEDERAL

28 United States Code

§ 1257 2

42 United States Code

§ 404(a) 18

§ 407 18

TABLE OF AUTHORITIES – Continued

Page(s)

§ 601 7

§ 602 ..... 3, 11

§ 606(a) ..... *passim*

§ 606(a)(1) 12

§ 606(a)(4) 1, 12

§ 670 5

§ 671 ..... 3, 5, 6, 25

§ 671(a)(15) 2

§ 672 ..... 5, 6, 9, 20

§ 672(a) ..... *passim*

§ 672(a)(1) 11

§ 672(a)(4) ..... *passim*

§ 672(a)(4)(A) 14, 15, 17, 22

§ 672(a)(4)(B)(i) 15, 17, 18, 19, 22

§ 672(a)(4)(B)(ii) ..... *passim*

§ 672(4)(a) 14

§ 672(B)(i) 3

§ 675(4) 2, 11

45 Code of Federal Regulations

§ 16 21

§ 16.1 21

§ 16.2 21

§ 201.6 ..... 6, 25

TABLE OF AUTHORITIES – Continued

Page(s)

§ 1355.20 21

§ 1355.21 21

§ 1355.30 21

§ 1355.30(n)(2) 6, 25

STATE OF CALIFORNIA

California Code of Civil Procedures

§ 1094.5 7

MISCELLANEOUS

Manual of Policies and Procedures

§ 45-202.3 ..... 4, 6

§ 45-202.31 ..... 4, 6

§ 45-202.311 ..... 4, 7, 8, 12

§ 45-202.312 ..... 4, 12, 13

§ 45-202.313 ..... 4, 7, 8, 12, 13

PETITION FOR WRIT OF CERTIORARI

Petitioners Eloise Anderson, as Director of the California Department of Social Services and the California Department of Social Services ("Petitioners") respectfully request that a writ of certiorari issue to the California Court of Appeal, Second Appellate District. That Court invalidated the regulations of the Director of the California Department of Social Services implementing the "linkage" requirement for purposes of Aid to Families with Dependent Children-Foster Care ("AFDC-FC") eligibility, holding that the Department's regulations were contrary to 42 U.S.C. § 672(a)(4).

OPINIONS AND ORDERS BELOW

The opinion of the California Court of Appeal of May 20, 1997 is reported at 55 Cal.App.4th 69 and is reproduced in Appendix A, at A-1 to A-21.[1] The July 30, 1997 order of the California Supreme Court denying petitioners' Petition for Review is unreported and is reproduced in Appendix C.[2]

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[1] Citations to the various Appendices throughout this petition will be designated as "App.," with pertinent appendix page numbers.

[2] The list of parties in this action are as follows:

Petitioners consist of Eloise Anderson, as Director of the California Department of Social Services and the California Department of Social Services. Respondents consist of Capitola Land, Maria Lopez and Jean McCrumby.

JURISDICTION

This Petition is filed within ninety days of the denial of the Petition for Review by the California Supreme Court on July 30, 1997. App. C. The statutory provision which confers jurisdiction on this Court to review the decision in question by writ of certiorari is 28 U.S.C. § 1257.

RELEVANT STATUTORY AND REGULATORY PROVISIONS

The following provisions are significantly involved in this case:

42 U.S.C. § 672(a)(4):

> (a) Each State with a plan approved under this part shall make foster care maintenance payments (as defined in section 675(4) of this title) under this part with respect to a child who would have met the requirements of section 606(a) of this title or of section 607 (as such sections were in effect on July 16, 1996) of this title but for his removal from the home of a relative (specified in section 606(a) (as so in effect) of this title), if-
>
> (1) the removal from the home occurred pursuant to a voluntary placement agreement entered into by the child's parent or legal guardian, or was the result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child and (effective October 1, 1983) that reasonable efforts of the type described in section 671(a)(15) of this title have been made;

(2) such child's placement and care are the responsibility of (A) the state agency administering the State plan approved under section 671 of this title, or (B) any other public agency with whom the State agency administering or supervising the administration of the State plan approved under section 671 of this title has made an agreement which is still in effect;

(3) such child has been placed in a foster family home or child-care institution as a result of the voluntary placement agreement or judicial determination referred to in paragraph (1); and;

(4) such child –

(A) would have received aid under the State plan approved under section 602 (as in effect on July 16, 1996) of this title in or for the month in which such agreement was entered into or court proceedings leading to the removal of such child from the home were initiated, or

(B)(i) would have received such aid in or for such month if application had been made therefor, or (ii) had been living with a relative specified in section 606(a) (as in effect on July 16, 1996) of this title within six months prior to the month in which such agreement was entered into or such proceedings were initiated, and would have received such aid in or for such month if in such month he had been living with such a relative and application therefor had been made.[3]

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[3] The cited statute includes the revisions added pursuant to § 108 of the Responsibility And Work Reconciliation Act of

California Department of Social Services Manual of Policies and Procedures, § 45-202.3:

.31 The child shall have been linked to the federal Aid to Families with Dependent Children – Family Group/Unemployed (AFDC-FG/U) Program during the month in which the petition was filed with the juvenile court, which led to the child's placement into foster care pursuant to a detention or dispositional order. This linkage requirement is met if one of the following conditions exists during the month in which the petition was filed:

.311 The child was living in the home of the parent or relative from whom removed, was eligible for, and received federal AFDC-FG/U.

.312 The child was living in the home of the parent or relative from whom removed and would have been eligible for federal AFDC-FG/U had application been made.

.313 The child was no longer living in the home of the parent or relative from whom removed, but would have been eligible for federal AFDC-FG/U based on that parent's or relative's home had he/she been living there and had application been made.

(a) To meet this condition, the child shall have been living with the parent or relative from whom removed, within any of the six months prior to the month in which the petition was filed with the juvenile court, which led to the

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1996 (Pub.L. No. 104-193) (Aug. 22, 1996) and the 1997 Balanced Budget Act (Pub.L. No. 105-33, § 5513(b), 111 Stat. 251) (Aug. 5, 1997).

child's placement into foster care pursuant to a detention or dispositional order.[4]

STATEMENT OF THE CASE

1. The AFDC-FC Program

The Aid to Families with Dependent Children-Foster Care ("AFDC-FC") Program, set forth in Title IV-E of the Social Security Act, is "[f]or the purpose of enabling each State to provide, in appropriate cases, foster care and transitional independent living programs for children who otherwise would have been eligible for assistance under part A of this subchapter . . . and adoption assistance for children with special needs." 42 U.S.C. § 670.

Pursuant to the AFDC-FC Program, the Director of the California Department of Social Services, through the county welfare departments, provides cash grant payments ("benefits") to those children who meet the eligibility requirements set forth in 42 U.S.C. § 672.

The federal AFDC-FC program is a federal matching grant program. 42 U.S.C. § 671. It is partially funded by the federal government and administered by the state. *King v. McMahon*, 186 Cal. App. 3d 648, 653, 230 Cal. Rptr. 911, 913 (1986), Cal. Sup. Ct. rev. *denied* Jan. 15, 1987. However, in order to receive federal funding for this

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[4] The regulations of the California Department of Social Services are set forth in the Manual of Policies and Procedures. The Manual of Policies and Procedures is maintained separately from the California Code of Regulations.

program, the state is required to follow federal law, regulations and guidelines in administering the AFDC-FC program. 42 U.S.C. § 671. Where a state is not in compliance with the program's requirements, as determined by the United States Department of Health and Human Services, the federal agency charged with the administration of the federal AFDC-FC program, federal funding for this program may be withheld. 45 C.F.R. §§ 201.6; 1355.30(n)(2); 42 U.S.C. § 671.

California has chosen to participate in the federal AFDC-FC Program. However, in order to receive federal funding, the state was required to implement a plan approved by the United States Department of Health and Human Services which meets the requirements set forth in Title 42, United States Code § 672. 42 U.S.C § 671. The California Department of Social Services has enacted regulations for the AFDC-FC program, which are set forth in Division 45 of the Department's Manual of Policies and Procedures ("MPP"). Consistent with 42 U.S.C. § 672(a)(4), the Department's regulations require that the child be "linked" to the AFDC program during the month the petition leading to the child's placement in foster care was filed. MPP § 45-202.3. In order to meet the linkage requirement, the child must be eligible for AFDC with the parent or relative from whom removed, not the relative with whom the child was living while in foster care. MPP § 45-202.31. The regulations further require the child to have lived with the parent or relative from whom removed within six months of the initiation of the petition which led to the child's placement in foster care. MPP § 45-202.31. These regulations were included in the state's Title IV-E of the Social Security Act plan, which

was approved by the United States Department of Health and Human Services.[5]

2. The Land, Lopez, & McCrumby Litigation

Respondents are individuals who were denied federal AFDC-FC benefits by petitioners on the basis that the children living with them did not meet the linkage requirement set forth in MPP § 45-202.313 because they did not live with the parent or relative from whom removed within six months of the initiation of the court petition removing them from their homes. California's regulations were challenged by way of Petitions for Writ of Mandate pursuant to California Code of Civil Procedure section 1094.5 in Los Angeles County Superior Court, alleging that MPP § 45-202.311 through MPP § 45-202.313 were contrary to 42 U.S.C. § 672(a)(4).[6]

In responding to respondents' allegations, petitioners maintained that its regulations were consistent with, and mandated by, the federal statute. Specifically, petitioners argued that 42 U.S.C. § 672(a)(4)(B)(ii), "which is virtually

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[5] The federal AFDC Program has been replaced by the Temporary Assistance for Needy Families ("TANF") Program. Pub.L. No. 104-193, Title I, §§ 103(a)(1), 116, 110 Stat. 2112, 2181 (Aug. 22, 1996). The TANF Program is codified in 42 U.S.C. § 601. California's program will continue to be called the "AFDC" Program until January 1, 1998 when new legislation becomes effective. However, the federal funding source for the state's program is the TANF Program.

[6] The Petition for Writ of Mandate filed by Respondent Capitola Land, Los Angeles County Superior Court Case No. BS027127, also sought relief pursuant to California Code of Civil Procedure section 1085.

identical to MPP § 45-202.313, applies when the child is not living in the home from which removal was sought at the time the petition is initiated. In that instance, the federal statute provides for linkage only when the child lived with that parent or relative within six months prior to the month in which removal proceedings were initiated. 42 U.S.C. § 672(a)(4)(B)(ii).

The superior court rejected petitioners' arguments and granted the Petitions for Writ of Mandate, holding that petitioners' regulations conflict with 42 U.S.C. § 672(a)(4). Land Statement of Decision, App. D, at D-2; Lopez Statement of Decision, App. E, at E-2; McCrumby Statement of Decision, App. F, at F-2. The superior court further held that the children at issue qualify for AFDC-FC benefits pursuant to Section 672(a)(4) because they received AFDC with the relative they were living with in foster care in the month in which court proceedings were instituted to legally remove them from their mother's custody. App. D, at D-2; App. E, at E-2; App. F, at F-2. Furthermore, petitioners were ordered to cease using MPP §§ 45-202.311 through 45-202.313 in determining eligibility for AFDC-FC benefits. App. D, at D-3; App. E, at E-3; and App. F, at F-4.

3. California Court of Appeal Proceedings

Petitioners filed an appeal from the judgments with the California Court of Appeal, Second Appellate District. On appeal, petitioners argued that in order to be linked to the AFDC Program for purposes of federal foster care eligibility, 42 U.S.C. § 672(a) requires that a child be linked to the AFDC program with the parent or relative

from whom removed during the month the removal petition was filed. Petitioners further argued that where the child was not living with the relative from whom removed at the time the petition was filed, the child must have lived with that relative within six months of the initiation of the petition. 42 U.S.C. § 672(a)(4)(B)(ii). Petitioners also maintained that this interpretation was consistent with that reached by the United States Department of Health and Human Services.

The Court of Appeal, ignoring subsection (a) of 42 U.S.C. § 672, issued an opinion on May 20, 1997, affirming the superior court's judgments. App. A. Relying upon the 1961 version of 42 U.S.C. § 672(a)(4), the Court of Appeal held "the plain text of the 1961 version required only that the children be receiving AFDC benefits in the month in which the petition was initiated and contained no express obligation that the children receive such benefits while physically residing with the parent or relative from whom removed." App. A, at 15. Accordingly, the Court of Appeal rejected petitioners arguments and determined that 42 U.S.C. § 672(a)(4) does not require a child to be linked to the AFDC Program with the parent or relative from whom removed. App. A, at 15.

4. Denial of Review by the California Supreme Court

Petitioners filed a Petition for Review with the California Supreme Court on June 26, 1997. App. B. The issue presented for review was: "Whether the Court of Appeal erred in holding that the Aid to Families with Dependent Children ("AFDC-FC") linkage requirement, a requirement for the federal Aid to Families with Dependent

Children-Foster Care ("AFDC-FC") Program, set forth in Title 42, United States Code § 672(a)(4), is satisfied if a child receives AFDC benefits with a foster care relative in the month the juvenile court petition removing the child from his or her home was initiated, when such a holding is contrary to the federal statute?" App. B, at 27. In the Petition for Review, petitioners again argued that the Court of Appeal's decision invalidates the Department's regulations, which are in total conformity with a plain reading of 42 U.S.C. § 672(a)(4), as well as with the federal government's interpretation of the federal statute. App. B, at 36-37. Petitioners' Petition for Review was denied by the California Supreme Court on July 30, 1997, without comment. App. C.

As the interpretation of 42 U.S.C. § 672(a)(4) has been considered and resolved at every step of the judicial process, this Court has jurisdiction to consider the federal issue raised in this case. *Illinois v. Gates*, 462 U.S. 213, 218 n.1 (1983).

REASONS FOR GRANTING THE WRIT

I

CERTIORARI SHOULD BE GRANTED BECAUSE THE CALIFORNIA COURT OF APPEAL'S DECISION IS CONTRARY TO THE PLAIN LANGUAGE OF 42 U.S.C. § 672(a)(4)

This case involves a question of exceptional importance concerning the interpretation of the federal statute governing the AFDC-FC Program set forth at 42 U.S.C. § 672(a)(4). The Court of Appeal's opinion dramatically

departs from a plain reading of the statute and the interpretation which the United States Department of Health and Human Services has previously applied. App. H. It also conflicts with this Court's reading of 42 U.S.C. § 672(a)(4). As will be demonstrated below, the erroneous interpretation reached by the California Court of Appeal will have tremendous fiscal consequences for the State of California.

Pursuant to 42 U.S.C. § 672(a), AFDC-FC benefits are available to children who would be eligible for AFDC benefits but for their removal from the home of a parent or relative as long as they meet the requirements set forth in sections 672(a)(1) through 672(a)(4). The "linkage" requirement at issue in this case is set forth in 42 U.S.C. § 672(a)(4). That statute, as revised in 1996 and 1997, provides:

> Each State with a plan approved under this part shall make foster care maintenance payments (as defined in section 675(4) of this title) under this part with respect to a child who would have met the requirements of section 606(a) of this title or of section 607 (as such sections were in effect on July 16, 1996) of this title but for his removal from the home of a relative (specified in section 606(a) (as so in effect) of this title), if-
>
> (4) such child-
>
> (A) would have received aid under the State plan approved under section 602 (as in effect on July 16, 1996) of this title in or for the month in which such agreement was entered into or court proceedings leading to the removal of such child from the home were initiated, or

> (B)(i) would have received such aid in or for such month if application had been made therefor, or (ii) had been living with a relative specified in section 606(a) (as in effect on July 16, 1996) of this title within six months prior to the month in which such agreement was entered into or such proceedings were initiated, and would have received such aid in or for such month if in such month he had been living with such relative and application therefor had been made.[7]

In order to ensure compliance with 42 U.S.C. § 672(a)(4), the California Department of Social Services implemented regulations which require the child to be linked to the AFDC program during the month the petition which led to the child's placement in foster care was initiated. MPP §§ 45-202.311-45-202.313. Pursuant to the Department's regulations, the linkage requirement is met if, during the month in which the petition was filed, one of the following conditions exist: 1) the child was living in the home of the parent or relative from whom removed and was eligible for, and received AFDC benefits (MPP § 45-202.311); 2) the child was living in the home of the parent or relative from whom removed and would have

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[7] Former 42 U.S.C. § 606(a) defined a "dependent child" as "a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home . . . or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home. (Act of Aug. 16, 1984, Pub.L. No. 98-378, § 20(a), 98 Stat. 1322)."

been eligible for AFDC benefits had an application been made (MPP § 45-202.312); or 3) the child was not living with the parent or relative from whom removed, but had lived with that parent or relative within six months prior to the month the removal petition was filed in juvenile court and the child would have been eligible for AFDC benefits based upon that parent or relative's home had he or she been living there and an application was made (MPP § 45-202.313).

In the instant case, the Court of Appeal held that a child who receives AFDC with a foster care relative during the month the juvenile court petition removing the child from his or her home was initiated satisfies the requirements set forth in 42 U.S.C. § 672(a)(4). App. A, at 15, 22. The Court of Appeal rejected petitioners' arguments that the child had to be eligible for AFDC with the parent or relative from whom legally removed, rather than the foster care relative, and that the child was required to have lived with the parent or relative from whom removed within six months of the initiation of the petition. App. A, at 15, 22. However, the Court of Appeal's decision is in direct conflict with 42 U.S.C. § 672(a)(4).

In determining that AFDC linkage, for purposes of AFDC-FC eligibility, does not have to be based upon the home of removal as long as the child is eligible for AFDC with the foster care relative, the Court of Appeal ignored the statutory language set forth in 42 U.S.C § 672(a). This subdivision clearly provides that a child's eligibility for AFDC-FC benefits is based upon the child's eligibility for AFDC with the relative from whom the child was removed. 42 U.S.C. § 672(a).

Specifically, 42 U.S.C. § 672(a) provides for federal foster care payments to children who would have been eligible for AFDC " . . . but for [their] removal from the home of a relative (specified in section 606(a) of this title), if [the requirements set forth in subsections (a)(1) through (a)(4) are met]." Accordingly, the focus of the AFDC-FC Program is on children who will lose AFDC eligibility when they are removed from their homes. 42 U.S.C. § 672(a). Pursuant to a plain reading of 42 U.S.C § 672(a), the "relative specified in section 606(a)" is referring to the relative from whom the child was removed and with whom the child would have been eligible for AFDC, but for the child's removal from the custody of that relative. Accordingly, the Court of Appeal's decision that the child is not required to be eligible for AFDC with the parent or relative from whom removed is contrary to a plain reading of the federal statute.

The Court of Appeal's interpretation of 42 U.S.C. § 672(a)(4) also conflicts with the interpretation reached by the Court in *Miller v. Youkim*, 440 U.S. 125 (1979). In discussing the requirements set forth in 42 U.S.C. § 672(a)(4), the Court in *Miller* stated in order to meet the linkage requirement, "the child must have been eligible for categorical assistance [AFDC] under the State's plan prior to initiation of the removal proceedings. [Citation.]" *Id.*, at 135. Similarly, the Court in *King v. McMahon*, 186 Cal. App. 3d 648, 654 (1896), stated "[t]o be eligible for foster care benefits under the federal program the child must have been receiving or eligible for 'AFDC-FG' (family group) or 'AFDC-U' (unemployment) prior to foster care placement. [Citation.]"

Based upon the foregoing authority, 42 U.S.C. § 672(a) requires the child to have been eligible for AFDC with the parent or relative from whom removed. When 42 U.S.C. § 672(4)(A) is read in conjunction with 42 U.S.C. § 672(a), the statute requires that the child received, or was eligible to receive, AFDC with the parent or relative from whom removed in or for the month the removal petition was filed. 42 U.S.C. § 672(a)(4)(A).[8] Accordingly, the Court of Appeal's conclusion that 42 U.S.C. § 672(a)(4)(A) "require[s] only that the children be receiving AFDC benefits in the month the petition was initiated and contain[s] no express obligation that the children receive such benefits while physically residing with the parent or guardian from whom they were removed" is erroneous. App. A, at 15.[9]

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[8] In order to have received AFDC with the parent or relative from whom removed at the time the petition was filed, as mandated by Section 672(a)(4)(A), former 42 U.S.C. § 606(a) required the child to have lived with that parent or relative in a place of residence maintained by that relative as his or her own home.

[9] Similarly, 42 U.S.C. § 672(a)(4)(B)(i), when read in its entirety, provides for AFDC linkage if the child would have received AFDC with the parent or relative from whom removed had an application been made. This also would require the child to have lived in the home of removal at the time the petition was filed. 42 U.S.C. § 606(a). However, where the child is not living in the home of removal during the month the petition is filed, as in the instant cases, 42 U.S.C. § 672(a)(4)(B)(ii) requires the child to have lived with the parents or relative from whom removed within six months of the initiation of the petition.

II

THE LEGISLATIVE HISTORY BEHIND 42 U.S.C. § 672(a)(4) DOES NOT SUPPORT THE COURT OF APPEAL'S INTERPRETATION

42 U.S.C. § 672(a) is derived from Public Law 87-31, which was enacted in 1961. Under the AFDC program as it existed in 1961, only those children who actually lived in the home of removal at the time the petition was initiated were eligible for foster care benefits. App. G, at 70-73, 86-89. In 1967, both the House of Representatives and the Senate felt that awarding benefits only to those children who were still in the home of removal was too limiting and were concerned that there would be a reluctance to place children in foster care (prior to the initiation of a removal petition) if federal foster care funding was not available. App. G, at 70-73, 86-89. Therefore, the category of children eligible for foster care benefits was expanded by making federal funds available to "children placed under court order who had been living with one of the specified relatives enumerated in the law within six months and would have been eligible upon application for AFDC if he [or she] were living with such relative and were removed from the home of such relative by order of the court. This latter group would include some children already in foster care . . . who . . . would not be eligible because they had already been removed from their homes." App. G, at 70-73, 86-89; 42 U.S.C. § 672(a)(4)(B)(ii).

A review of the legislative history establishes that Congress specifically enacted 42 U.S.C. § 672(a)(4)(B)(ii) in order to extend AFDC-FC benefits to those children who were not living in the home of removal at the time

the petitions were filed. App. G, at 70-73. Clearly, Congress intended for the time limitation set forth in 42 U.S.C. § 672(a)(4)(B)(ii) to be imposed where the child is not living with the relative from whom removed at the time the petition is initiated. The Court of Appeal's interpretation of 42 U.S.C. § 672(a)(4) not only renders Sections 672(a) and 672(a)(4)(B)(ii) meaningless, but also ignores the legislative history behind, and the amendments made to, 42 U.S.C. § 672(a)(4) in 1967. App. G, at 70-73.

In addition, the Court of Appeal's decision is flawed because it is based upon the faulty premise that the 1961 Act only required that the child receive AFDC with any relative, including the foster care relative, in the month which the removal petition was filed. App. A, at 15. However, as with the current statute, the 1961 statute also required the child to have actually received AFDC with the parent or relative from whom removed and to have lived with that relative in the same month the removal petition was filed. 42 U.S.C. § 672(a)(4)(A); 42 U.S.C. § 606(a).[10]

In its decision, the California Court of Appeal held that the 1961 statute provided federal foster care payments to those children who: " '1) would meet the

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[10] The current statute also provides for AFDC linkage where the child would have been eligible to receive AFDC in the home of removal had an application been made and where the child had lived in the home of removal within six months of the initiation of the petition and would have been eligible for AFDC during the month the petition was filed. 42 U.S.C. § 672(a)(4)(B)(i); 42 U.S.C. § 672(a)(4)(B)(ii).

requirements of such Section 404(a) or of section 407 except for his removal after April 30, 1961, from the home of a relative (specified in such section 406(a)) as a result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child, (2) for whose placement and care the State or local agency administering the state plan approved under section 402 is responsible, (3) who has been placed in a foster family home as a result of such determination, and (4) *who received aid under such State plan in or for the month in which court proceedings leading to such determination were initiated. . . .* ' [Citation.]" App. A, at 13-14, emphasis in original.

Again, as is emphasized in the Court of Appeal's opinion, the Court focussed only on the language set forth in subdivision (a)(4) of the statute and simply concluded that a child "who received aid under such state plan in or for the month in which court proceedings leading to such determination were initiated." App. A, at 14. In so doing, the Court of Appeal ignored the language set forth in subdivision (a)(1), which focusses on AFDC eligibility with the relative from whom the child was removed. App. A, at 14. Accordingly, the Court of Appeal's interpretation of the linkage requirement is also contrary to the 1961 version of the statute.

The Court of Appeal's analysis regarding the 1967 amendments to the Social Security Act is also contrary to the legislative history. App. A, at 16-17. The Court of Appeal determined that 42 U.S.C. § 672(a)(4)(B)(i) and 42 U.S.C. § 672(a)(4)(B)(ii) were primarily intended to expand foster family care payments to those situations where the child would have been eligible for aid had the

family applied; and secondarily, to cover situations where a child who would have been eligible for AFDC in the home of removal, had the family applied, but is placed in foster care with a non-relative prior to the petition being filed. App. A, at 17-18.

Petitioners do not dispute that 42 U.S.C. § 672 (a)(4)(B)(i) was intended to eliminate "the distinction between indigent children actually receiving AFDC benefits and those entitled to such benefits but who had, for whatever reason, failed to obtain them." App. A, at 15. However, the Court of Appeal erred in determining that the application of 42 U.S.C. § 672(a)(4)(B)(ii) is limited to emergency situations where the child was placed with a non-relative before official action could be taken. App. A, at 17-18.

A review of the legislative history establishes that in 1967, federal funding was made available to those children who were eligible for AFDC in the home of removal but who were not living in the home of removal at the time the petition was filed, such as those children "whose parents are killed and for whom the court does not take immediate jurisdiction." App. G, at 71-73, 88. Also included in this category are " . . . some children already in foster care at the time of this legislation and who, except for this provision, would not be eligible because they had already been removed from their homes." App. G, at 72, 87-88.

Pursuant to the federal foster care program as it existed prior to 1967, these children could not have been linked to the AFDC Program because they were not in the home of removal at the time the petition was filed. App.

G, at 71-73, 87-88. The Court of Appeal, however, determined that Congress did not intend for section 672 (a)(4)(B)(ii) to apply to situations where a child is eligible for AFDC with a relative in foster care because the House Ways and Means Committee stated that " *'[t]he child need not live with a relative and may be in a foster family home or in a voluntary institution at the time the court makes its decision'* " in order to qualify for federal foster care payments. App. A, at 17-18.

Although a child may be eligible to receive AFDC-FC while living with a non-relative in foster care or if placed in foster care prior to the court's granting of the removal petition, the legislative history does not indicate that Congress intended to limit 42 U.S.C. § 672(a)(4)(B)(ii) to children living with non-relatives at the time the petition was filed and who, therefore, would not be eligible for AFDC benefits. In addition, 42 U.S.C. § 672(a)(4) does not differentiate between children placed with non-relatives and those placed with relatives at the time the petition was filed in determining the home with which the child must be eligible for AFDC. Pursuant to 42 U.S.C. § 672(a), linkage to the AFDC Program for purposes of AFDC-FC eligibility is always based upon AFDC eligibility in the home from which the child was removed, regardless of whether the child is placed with a relative or non-relative in foster care.

Congress has expressly based linkage to the AFDC Program upon the home of removal. 42 U.S.C. § 672(a). However, the Court of Appeal, in ignoring subdivision (a) of 42 U.S.C. § 672, has interpreted the statute in a manner contrary to that intended by Congress.

III

FEDERAL AFDC POLICY SUPPORTS CALIFORNIA'S ENACTMENT AND ENFORCEMENT OF THE LINKAGE REQUIREMENT

The federal agency responsible for administering the AFDC program, the United States Department of Health and Human Services ("DHHS"), firmly supports petitioners' contention that 42 U.S.C. § 672(a)(4) requires a child to have lived with the parent or relative from whom removed within six months of the initiation of the petition removing the child from his or her prior home or the voluntary placement agreement.

In 1994, the DHHS issued Decision No. 1485. App. H.[11] Pursuant to the interpretation reached by the United States Department of Health and Human Services, as set forth in Decision No. 1485, 42 U.S.C. § 672(a) "contemplates that the removal of the child from the contrary-to-

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[11] Pursuant to 45 C.F.R. § 1355.20 (1996) and 45 C.F.R. § 1355.21 (1996), the United States Department of Health and Human Services is the federal agency charged with administering Titles IV-E and IV-B of the Social Security Act. 45 C.F.R. § 1355.30 (1996) further provides that the procedures and requirements set forth in Part 16 (Department Grant Appeals Process) "shall apply to all programs funded under the provisions funded under the provisions of these regulations and titles IV-E and IV-B of the Social Security Act." Pursuant to Part 16 of Title 45, the Departmental Appeals Board is charged with the review of final decisions issued by the United States Department of Health and Human Services regarding state disallowances for federal funding under title IV-E of the Social Security Act when a state fails to comply with federal requirements. 45 C.F.R. § 16.1 (1996); 45 C.F.R. § 16.2 (1996); 45 C.F.R., Pt. 16, App. A (1996).

the-welfare home will cause the loss of the child's existing AFDC eligibility." App. H, at 102. According to the DHHS, the statute therefore authorizes three options for establishing AFDC eligibility that is lost when the child is removed from the home of a specified relative. App. H, at 102-103.

As stated by the United States Department of Health and Human Services in Decision No. 1485:

> [S]ection 472(a)(4) specifies the month for which the child must establish the AFDC eligibility that is lost by virtue of the child's removal from the home of the relative. It authorizes three options, the first two of which apply where the child was living with the specified relative in the month in which court proceedings were initiated: *i.e.*, either the child must be receiving AFDC in or for the month in which court proceedings leading to the removal of the child from the home were initiated (section 472(a)(4)(A)), or the child would have received AFDC in or for the same month if an application had been made (section 47(a)(4)(B)(i)). The third option applies where the child was not living with the relative in the month in which court proceedings were initiated, in which case the child must have been living with a specified relative within six months prior to that month and would have received AFDC in and for the month court proceedings were initiated if the child had still been living with the relative in that month and an application for AFDC had been made (section 672(a)(4)(B)(ii).) The effect of the latter provision is to allow a child who had already been removed from the contrary-to-the-welfare home (and who had thus already lost

> AFDC eligibility prior to the month court proceedings were initiated by virtue of having been removed from that home) to nevertheless qualify for foster care payments if the removal occurred no more than six months prior to the month court proceedings were initiated. App. H, at 102-103.

Thus, federal AFDC-FC policy unambiguously supports California's interpretation that in order to meet the AFDC eligibility requirement for purposes of establishing eligibility for AFDC-FC benefits, the child must have lived with the parent or relative from whom removed within six months of the initiation of the petition removing the child from the custody of that relative. DHHS' Departmental Appeals Board Decision No. 1485 is entitled to substantial deference. As this Court has recognized, "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron, USA, Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984). This Court has also cautioned that when interpreting a statute " 'the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong. . . . ' " *New York Dept. of Social Services v. Dublino*, 413 U.S. 405, 421 (1973), quoting, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 369, 381 (1969). The federal agency's decision, which validates the states' interpretation of the linkage requirement constitutes another compelling reason for granting the California Department of Social Services' petition for writ of certiorari.

IV

THE CALIFORNIA COURT OF APPEAL'S DECISION IMPOSES A POTENTIALLY DEVASTATING FISCAL IMPACT ON THE STATE OF CALIFORNIA AND ON THE VARIOUS COUNTIES THROUGHOUT THE STATE

As previously argued, the California Court of Appeal ignored the entire statutory scheme set forth in 42 U.S.C. § 672(a)(4) and interpreted the linkage requirement in a manner contrary to that intended by Congress. As a result of this decision, the State of California, as well as the various counties throughout the state, will be forced to pay the higher AFDC-FC rate for thousands of children who are not eligible under the express terms of the federal statute.[12]

The instant case involves a state welfare program of enormous fiscal dimensions. For instance, for the 1995-1996 fiscal year, the AFDC-FC Program cost taxpayers approximately $703,676,233 in foster care grant payments. App. I. Although the incremental cost of paying the higher AFDC-FC rate may appear small with regard to an individual recipient, the potential financial impact of the Court of Appeal's decision on the State of California and the various counties is substantial to a program of this fiscal magnitude.[13]

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[12] The AFDC-FC rate is paid at a higher monthly rate than the regular AFDC rate. *King v. McMahon*, 186 Cal. App. 3d 648, 653 (1986), citing *Ramos v. Montgomery*, 313 F.Supp. 1179, 1181-1182, *aff'd.* 400 U.S. 1003 (S.D.Cal. 1970).

[13] For instance, of the approximately 105,000 children in foster care, 18,200 of these children are currently receiving monthly AFDC/Temporary Assistance for Needy Families

Even more important, where a state is not in compliance with the requirements of the federal program, as determined by the United States Department of Health and Human Services, federal funding may be withheld. 45 C.F.R. §§ 201.6; 1355.30(n)(2); 42 U.S.C. § 671.

The Court of Appeal's decision requires that California be out of compliance with 42 U.S.C. § 672(a)(4), as well as with the federal government's interpretation of that statute. App. H, at 102-103. Should the federal government determine that the linkage requirement is not met in situations, such as the instant cases, where the child did not live in the home of removal within six months of the initiation of the petition, the State of California may be forced to bear this massive financial burden without federal financial assistance. In view of the fiscal importance of this federal question to the State of California, certiorari should be granted. *Alaska v. American Can Co.*, 358 U.S. 224, 225 (1959).

CONCLUSION

The question presented in this case "is an important one of first impression" and may have a tremendous fiscal impact on the State of California. *American Federation of Musicians v. Wittstein*, 379 U.S. 171, 175 (1964). Compelling reasons exist for granting this petition for writ of certiorari to resolve the conflicting interpretations

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("TANF") benefits. A significant portion of these children, if not most, will now be eligible for the higher monthly AFDC-FC payments.

of this federal statute. The Court's authoritative guidance on this important question of federal law is vital.

DANIEL E. LUNGREN,
Attorney General of the
State of California
CHARLTON G. HOLLAND III,
Assistant Attorney General
JOHN H. SANDERS,
Supervising Deputy
Attorney General
*ROBIN T. GERTLER,
Deputy Attorney General
Attorneys for Petitioners
**Counsel of Record*

APPENDICES

TABLE OF CONTENTS

Page

A. Published Opinion of the Court of Appeal of the State of California, Second Appellate District, Division Four Filed May 20, 1997 ...App. 1

B. Petition for Review in the California Supreme Court filed on June 26, 1997 (Excluding Appendices).....App. 24

C. Supreme Court Denial of Petition for Review dated July 30, 1997.....App. 48

D. Los Angeles County Superior Court Statement of Decision in *Land v. Anderson*, Case Number BS027127 .....App. 49

E. Los Angeles County Superior Court Statement of Decision in *Lopez v. Anderson*, Case Number BS030821 .....App. 52

F. Los Angeles County Superior Court Statement of Decision in *McCrumby v. Anderson*, Case Number BS028418.....App. 55

G. Social Security Amendments of 1967-90th Congress, 1st Session-House Report No. 544; 90th Congress, 1st Session-Senate Report No. 744 (Selected Portions).....App. 60

H. Department of Health and Human Services-Departmental Appeals Board, Appellate Division-Decision No. 1485 .....App. 90

I. California Department of Social Services-Administrative Division, Foster Care Expenditures for the Federal Foster Care Program.....App. 122

APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

CAPITOLA LAND et al.,	B094688
Plaintiffs and Respondents,	(Super. Ct. Nos. BS027127, BS030821,BS028418)
v.	
ELOISE ANDERSON, as Director, etc.,	(Filed May 20, 1997)
Defendant and Appellant.	

APPEALS from judgments of the Superior Court of Los Angeles County, Robert H. O'Brien and Diane Wayne, Judges. Affirmed.

Daniel E. Lungren, Attorney General, Charlton G. Holland, Assistant Attorney General, John H. Sanders, Supervising Deputy Attorney General, and Robin T. Gertler, Deputy Attorney General, for Defendant and Appellant.

Barbara A. Jones, Marjorie Shelvy and Kirk McInnis for Plaintiffs and Respondents.

This appeal raises the issue of whether indigent children who did not reside with their parent or other legal

guardian for more than six months prior to the date that the Department of Children and Family Services ("DCFS") petitioned to officially remove them from custody of the parent or guardian can establish the "AFDC linkage" needed to qualify for federal foster care payments under former section 672 of title 42 of the United States Code. Each of the children involved here had been abandoned by his or her biological parents to the care of relatives more than six months prior to the date that DCFS filed a petition to remove from parental custody and place with a foster family. In each case, the petitions were granted and the children formally placed in the custody of the relatives who had been voluntarily assuming their care prior to the petition. Each of the children was receiving benefits under the federal Aid to Families With Dependant Children ("AFDC") program through payment to the relative with whom they were residing at the time the petition to remove from parental custody was filed. In addition, each of the children would have been eligible for AFDC benefits had they been residing with their parent. But, according to regulations issues by the State Department of Social Services ("the Department"), none were eligible for federal foster care payments because they were not linked to AFDC through living with the parent from whose custody they were "removed" during the six-month period prior to the date the petition was initiated.

Two trial courts in three separate decisions concluded that the Department violated the plain meaning of the governing statute, and granted the writ petitions of respondents Capitola Land, Maria Lopez, and Jean McCrumby, invalidating the regulations, and ordering the

Department to reverse the denial of federal foster care payments. In addition, the Department was ordered to pay the attorney's fees of respondents Land and Lopez. After careful review of the statutory provisions, the legislative history, the intent of Congress, and the purpose of the law, we concur with the trial courts, and affirm.

FACTUAL AND PROCEDURAL HISTORY

Land v. Anderson

On December 1, 1990, or a few months thereafter, respondent Capitola Land's granddaughter, Sade L., was left at John Land's house by Sade's mother (respondent's daughter and Mr. Land's niece). Mr. Land applied for and received AFDC benefits for Sade. DCFS filed a petition to remove Sade from the care and custody of her mother on October 30, 1991. Mr. Land became seriously ill, and died in August 1992. Sade went to live with respondent in July 1992. In September of 1992, respondent's request for federal foster care benefits was denied by DCFS, acting on behalf of the Department. Respondent appealed, and the hearing officer reversed the denial because Sade had received AFDC benefits during the period from December 1, 1990, through August 21, 1992, while living with her great uncle. The director did not adopt the hearing officer's determination, but upheld the decision to deny benefits because "the child, Sade L., did not live with her mother or her father during any of the six months prior to or during the month in which the October 30, 1991, petition was filed with the Juvenile Court, which led to the child's removal from her parents' custody and placement in foster care."

Respondent Land petitioned for a writ of mandate, seeking an order reversing the denial of federal foster care benefits. The trial court granted the petition and ordered the Department to issue federal foster care payments to respondent on behalf of Sade retroactive to September 1992. Subsequently, the court instructed the Department to pay $14,995 in attorney's fees pursuant to Code of Civil Procedure section 1021.5 and Welfare and Institutions Code section 10962.

Lopez v. Anderson

Evelyn R. and Iliana R. lived in Puerto Rico with their mother. In October of 1990, Puerto Rico's Department of Social Services removed the children, along with another sibling, and placed them with a maternal aunt, Brunilda Gomez, in California. In June of 1991, Gomez wrote to DCFS stating that she was arranging with respondent Lopez to care for Evelyn and Iliana. The children began living with respondent on September 7, 1991. Respondent's receipt of AFDC benefits for Evelyn and Iliana was effective June of 1991. DCFS filed a petition to remove the girls from the mother's custody on August 12, 1993. At that same time, DCFS signed a relative caregiver agreement with respondent. The petition was granted on September 23, 1993, officially removing the girls from their mother and placing them with respondent.

Respondent's request for federal foster care payments was denied by DCFS on September 15, 1993, on the ground that Evelyn and Iliana did "not meet all eligibility requirements for federal participation in AFDC-FC [the

federal foster care program]." Respondent requested a hearing. The hearing officer concluded that respondent was not entitled to federal foster care payments because, to meet the requirements, the child must either have been living in the home of the parent from whom removed during the month the petition was filed or within six months prior to the filing date.

Respondent Lopez filed a petition for writ to overturn the determination. The trial court granted the writ, ordering the Department to approve federal foster care benefits for respondent on behalf of Iliana and Evelyn effective September 1993. As in the Land matter, the court later ordered payment of attorney's fees under Code of Civil Procedure section 1021.5 and Welfare and Institutions Code section 10962, this time in the amount of $26,186.

McCrumby v. Anderson

Respondent McCrumby's daughter has had nine children, all of whom have been removed from her custody, six of whom were placed with respondent. Deshone D. was informally placed with respondent at birth in May 1988. In August 1988, the mother abandoned Frederick B. and George R., and respondent picked them up and informed the DCFS case worker that the children were with her. Derrick J. was placed with respondent McCrumby by DCFS in December 1989, after being in foster care with a non-relative for two months. Penelope J. and Kenisha H. were also placed with respondent at birth in May of 1991 and April of 1992, respectively. DCFS filed a petition to officially remove Deshone, Frederick,

George, and Derrick from their mother on October 26, 1989. The petition to remove Penelope was filed in May of 1991; the petition to remove Kenisha was filed in April of 1992.

In June of 1993, respondent's request for federal foster care payments on behalf of all these children was denied by DCFS because there was insufficient information to determine the financial situation of the children's mother. At the subsequent administrative appeal, the hearing officer concluded: (1) that denial was proper as to George and Frederick because their removal from the mother's home was informal in that there was no court ordered placement; (2) that denial was proper as to Derrick, Penelope, and Kenisha, because DCFS was unable to establish their eligibility for AFDC through their mother; and (3) that denial was proper as to Deshone for both reasons.

Like respondents Land and Lopez, McCrumby petitioned the trial court for relief from the denial of her request for federal foster care payments. While the petition was pending, DCFS located the mother, and was able to establish AFDC linkage for Derrick, Penelope, and Kenisha. The trial court concluded that Deshone, Frederick, and George were eligible as of the date of the October 1989 petition to remove them from their mother.

The Department noticed timely appeals from the judgments entered in all three cases, and from the subsequent orders awarding attorney's fees in the Land and Lopez cases. All the appeals were consolidated.

DISCUSSION

I

Under the federal AFDC program applicable here,[1] federal funds were made available to those states which submitted and had approved by the Department of Health, Education and Welfare a plan for aid and services to needy families with children. Although the program was elective, once a state chose to join, its plan had to comply with the mandatory requirements established by the Social Security Act, as interpreted and implemented by regulations promulgated by the Department of Health, Education and Welfare. (*County of San Mateo v. Dell J.* (1988) 46 Cal.3d 1236, 1242; *County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 738-739.) One of the requirements for participation in the AFDC program was that the state have in effect a state plan for foster care. (*County of San Mateo v. Dell J., supra,* at p. 1243.)

Section 672(a) of title 42 United States Code defines those children for whom federal foster care payments must be made available by the states. During the period relevant to this litigation,[2] it provided in part: "Each State

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[1] The AFDC program was amended by the Welfare Reform Act of 1996. (Pub.L.No. 104-193, 110 Stat. 2105.) The provisions of the act do not become effective until July 1, 1997. (Pub.L. No. 104-193, § 116, 110 Stat. 2181.) We are not here concerned with these changes wrought by the act, and express no opinion concerning their impact on the federal foster care program.

[2] This subdivision has also been amended subsequent to the events described above. (Pub.L. No. 104-193, § 108, 110 Stat. 2166-2167.) For purposes of this opinion, we will refer to the legislation in effect at the relevant time.

with a plan approved under this part shall make foster care maintenance payments (as defined in section 675(4) of this title) under this part with respect to a child who would meet the requirements of section 606(a)[3] of this title or of section 607[4] of this title but for his removal from the home of a relative (specified in section 606(a) of this title), if – [¶] (1) the removal from the home occurred pursuant to a voluntary placement agreement entered into by the child's parent or legal guardian, or was the result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child and (effective October 1, 1983) that reasonable efforts of the type described in section 671(a)(15) of this title have been made; [¶] (2) such child's placement and

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[3] Under former section 606(a), the term "dependent child" was defined as "a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home (other than absence occasioned solely by reason of the performance of active duty in the uniformed services of the United States), or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home" and meets the age requirements. (Act of Aug. 16, 1984, Pub.L. No. 98-378, § 20(a), 98 Stat. 1322.)

[4] Former section 607(a) added to the definition of dependent child those needy children who met the age requirements of section 606(a)(2), and who had "been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of the parent who is the principal earner, and who is living with any of the relatives specified in section 606(a)(1). . . . " (Act of Nov. 5, 1990, Pub.L. No. 101-508, tit. V, §§ 5061(a), 5062(a), 104 Stat. 1388-231, 1388-232.)

care are the responsibility of (A) the State agency administering the State plan approved under section 671 of this title, or (B) any other public agency with whom the State agency administering or supervising the administration of the State plan approved under section 671 of this title has made an agreement which is still in effect; [¶] (3) such child has been placed in a foster family home or child-care institution as a result of the voluntary placement agreement or judicial determination referred to in paragraph (1); *and* [¶] *(4) such child* – [¶] *(A) received aid under the State plan approved under section 602 of this title in or for the month in which such agreement was entered into or court proceedings leading to the removal of such child from the home were initiated, or* [¶] *(B)(i) would have received such aid in or for such month if application had been made therefor, or (ii) had been living with a relative specified in section 606(a) of this title within six months prior to the month in which such agreement was entered into or such proceedings were initiated, and would have received such aid in or for such month if in such month he had been living with such a relative and application therefor had been made."* (Former 42 U.S.C. § 672(a); Act of Dec. 22, 1987, Pub.L. No. 100-203, tit. XI, §§ 9133(b)(2), 9139(a), 101 Stat. 1330-314, 1330-321, emphasis added.)

There is no dispute that the first three requirements of section 672(a) were met: the children were removed from their homes pursuant to a judicial determination that continuation would be contrary to their welfare and after reasonable efforts to keep the child in the home were made (§ 672(a)(1)); the children's placement and care were and are the responsibility of DCS, the agency appointed by the Department to administer the state plan

(§ 672(a)(2)); and the children are in foster family homes as the result of the same judicial determination that concluded continuation in the prior home would be contrary to their welfare (§ 672(a)(3)). The debate is over the proper interpretation of section 672(a)(4), known as the AFDC linkage requirement.

Respondents and their supporters contend that the plain language of section 672(a)(4)(A) and (a)(4)(B)(i) qualifies all those children who were receiving AFDC benefits in the month in which court proceedings leading to the removal were initiated, or who would have received such aid if application had been made, without regard to whether or not they are physically residing with the parent or other legal guardian from whose custody they are being removed. Respondents rely on the oft-expressed principle of statutory construction that where the words of the statute, given their ordinary definitions, are reasonably free from ambiguity, one should look no further to ascertain the statute's meaning. (See, e.g., *Botello v. Shell Oil Co.* (1991) 229 Cal.App.3d 1130, 1135; *City of Los Angeles v. Los Olivos Mobile Home Park* (1989) 213 Cal.App.3d 1427, 1433.)

The Department relies on the recognized exception to the plain meaning rule, that the literal words of a statute may be disregarded where necessary to avoid absurd results or to give effect to a manifest purpose that appear from the statute's legislative history or its provisions considered as a whole. (See, e.g., *County of Sacramento v. Hickman* (1967) 66 Cal.2d 841, 849, fn. 6; see *Napa Valley Educators' Assn. v. Napa Valley Unified School Dist.* (1987) 194 Cal.App.3d 243, 248 ["The various parts of a statutory

enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole. [Citations.]"].) The Department contends that the interpretation proposed by respondents is contrary to the purpose of the statute as expressed by Congress in enacting the applicable version of section 672, and would render section 672(a)(4)(B)(ii) superfluous. The Department urges that we defer to the interpretation of the statute set forth in their regulations and statements of policy and the decisions of the appellate division of the United States Department of Health and Human Services. We turn to these contentions.

A

The Department's interpretation of the statute as excluding those children linked to AFDC through someone other than the parent or guardian from whom removed depends on the language of section 672(a)(4)(B)(ii). That subdivision qualifies children who had been "living with a relative specified in section 606(a)" within six months of the date a voluntary placement agreement was entered into or a judicial determination resulted in the removal of the child from the home. The language appears to draw a distinction between "living with" a relative and being "removed from" the custody of that relative. According to the Department's interpretation, the distinction means that this subdivision is to be applied whenever a child is no longer physically living with the relative whose legal custody DCFS is challenging. If the child is residing with someone other than that parent or guardian, and petition to formalize the custody change is filed within six months, then the

child can qualify for federal foster care payments. But if for any reason – including the fault of DCFS – a petition to legally remove a child from the custody of the parent or guardian is not initiated within six months of the date the child ceases to live with the parent or guardian, the child and his or her foster parent can never establish entitlement to federal foster care payments.

Once section 672(a)(4)(B)(ii) is construed as a limitation on the length of time an indigent child can reside apart from his parent or legal guardian and still obtain federal foster care payments, then section 672(a)(4)(A) and (a)(4)(B)(i) must be seen in a whole new light, under the Department's construction. The Department would read into those provisions a requirement that the child in question be physically residing with the parent or legal guardian from whom removal is sought, and that the determination of whether he is receiving AFDC under section 672(a)(4)(A) or entitled to AFDC under section 672(a)(4)(B)(i) be with reference to that parent or guardian.

The Department has promulgated regulations which codify its interpretation of the statute. According to these regulations: "The child shall have been linked to the federal Aid to Families with Dependent Children-Family Group/Unemployed (AFDC-FG/U) Program during the month in which the petition was filed with the juvenile court, which led to the child's placement into foster care pursuant to a detention or dispositional order. This linkage requirement is met if one of the following conditions exists during the month in which the petition was filed: [¶] .311 The child was living in the home of the parent or relative from whom removed, was eligible for, and

received federal AFDC-FG/U. [¶] .312 The child was living in the home of the parent or relative from whom removed and would have been eligible for federal AFDC-FG/U had application been made. [¶] .313 The child was no longer living in the home of the parent or relative from whom removed, but would have been eligible for federal AFDC-FG/U based on that parent's or relative's home had he/she been living there and had application been made. [¶] (a) To meet this condition, the child shall have been living with the parent or relative from whom removed, within any of the six months prior to the month in which the petition was filed with the juvenile court, which led to the child's placement into foster care pursuant to a detention or dispositional order." (Cal.-SDSS Manual Letter No. EAS-91-14, Reg. No. 45-202, § .3 (eff. Oct. 1, 1991), p. 643.)

The Department seeks to support its interpretation of section 672(a)(4)(B)(ii) by citation to legislative history. The statute governing eligibility for federal foster care payments was originally enacted in 1961.[5] The 1961 version stated: "(a) the term 'dependent child' shall notwithstanding section 406(a), also include a child (1) who

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[5] It was then part of title IV-A of the Social Security Act. In 1967, the statute was amended and the current language was added. (Act of Jan. 2, 1968, Pub.L. No. 90-148, 81 Stat. 821, 892-892.) In 1980, Public Law No. 96-272 expanded the AFDC-Foster Care program established by Public Law No. 87-31 and shifted it to title IV-E of the Social Security Act. Public law No. 96-272 did not make any changes in the relevant statutory language as it was originally enacted in 1961 and amended in 1967. (See Pub.L. No. 96-272 (June 17, 1980) 94 Stat. 501, 503-504.)

would meet he requirements of such section 406(a) or of section 407 except for his removal after April 30, 1961, from the home of a relative (specified in such section 406(a)) as a result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child, (2) for whose placement and care the State or local agency administering the State plan approved under section 402 is responsible, (3) who has been placed in a foster family home as a result of such determination, and (4) *who received aid under such State plan in or for the month in which court proceedings leading to such determination were initiated. . . .* " (Act of May 8, 1961, Pub.L.No. 87-31, § 408(a), 75 Stat. 76, emphasis added.)

The Department asserts that under the 1961 version of the act, federal foster care payments were available solely to those children who were both physically residing with the abusive or negligent parent or guardian and were receiving AFDC benefits. In that case, the argument goes, the 1967 amendments, which added section 672(a)(4)(B)(i) and (ii), can only be seen as expanding federal foster care payment eligibility to two new categories of children: (1) those residing with custodial parents or guardians who had neglected to apply for or obtain AFDC benefits, and (2) those who were abandoned by their parent or guardian prior to a petition to remove from custody being filed, but only where action was taken on their behalf within six months.

The obvious fallacy in the Department's analysis is that the original AFDC linkage requirement contained essentially the same language as the applicable version of section 672(a)(4)(A). It mandated that children "who received aid under such State plan in or for the month in

which court proceedings leading to such determination [that continuation in the home would be contrary to the welfare of such child] were initiated . . . ," and who met the other three requirements, be considered qualified for federal foster care benefits. As with the applicable language of section 672(a)(4)(A), the plain text of the 1961 version required only that the children be receiving AFDC benefits in the month in which the petition was initiated and contained no express obligation that the children receive such benefits while physically residing with the parent or guardian from whom they were removed. The most that can be said for the Department's position in this regard is that the same conflicting interpretations with which we are faced today could have been raised under the predecessor statute.

The Department's attempt to rely on the reports of the congressional committees responsible for the 1967 amendments is equally vain. The Department believes that these reports demonstrate a legislative intent to limit federal foster care payments to children living with their parent or legal guardian during the six months preceding the petition to remove. In fact, the reports demonstrate that Congress was primarily focused on eliminating the distinction between indigent children actually receiving AFDC benefits and those entitled to such benefits but who had, for whatever reason, failed to obtain them. In this regard, the House Committee on Ways and Means had this to say: "Your committee believes that some children now receiving AFDC would be better off in foster homes or institutions than they are in their own homes. . . . Under the AFDC program, as amended in 1961, Federal funds are available for the care of children in

foster family care or in voluntary institutions if they were recipients of AFDC when they were removed from their home by a court. . . . [¶] Your committee is aware of the limitations on the provision described above for foster care through the AFDC program when children are removed from their home by court order. For the State to receive any Federal sharing, the children must be recipients of AFDC when the court issues its order. Your committee believes that this is an unduly limiting restriction and is proposing that this limitation be changed. There is some evidence that courts may be reluctant to place a child in foster care because Federal funds are not available (and the cost of the care must come out of local funds in many areas) unless the child is in the home of a specified relative. The proposed change would make the cost of caring for children in foster care subject to Federal sharing if the child has been placed in foster care by a court order (if the child is removed form the home of a relative as a result of a judicial determination that continuation in such home would be contrary to his welfare) and if the child would have been eligible for aid under the AFDC program if an application had been made on his behalf."[6] (H.R.Rep. No. 544, 90th Cong., 1st Sess., at pp. 100-101.) It is obvious from this language that the main intent of the amendments was to make federal foster care payments available for those children whose parent or legal guardian had neglected to apply for AFDC benefits. Section 672(a)(4)(B)(i) allowed the foster

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[6] The Senate Committee on Finance,which reviewed the bill on behalf of the Senate, contains essentially the same language. (Sen.Rep. No. 744, 50th Cong., lst Sess., pp. 163-164, reprinted in 1967 U.S. Code Cong. & Admin. News,pp. 2834, 3000-3001.)

parent to collect federal foster care payments as long as the child was entitled to the AFDC aid.

In comparison, the House Ways and Means Committee had relatively little to say about the purpose of section(a)(4)(B)(ii). The Department relies heavily on the statement that the proposed amendments would "[a]lso includ[e] . . . children placed under court order who had been living with one of the specified relatives enumerated in the law within 6 months and would have been eligible upon application for AFDC if he were living with such relative and were removed from the home of such relative by order of the court." (H.R.Rep. No. 544, *supra*, at p. 101.) This emphasis on one sentence of the report ignores the context in which this comment was made. In the next few sentences the committee explains: "This latter group would include some children already in foster care at the time of this legislation and who, except for this provision, would not be eligible because they had already been removed from their homes. Temporary plans may be needed, for example, for children both of whose parents are killed in an accident and for whom the court does not take immediate jurisdiction. *The child need not live with a relative and may be in a foster family home or in a voluntary institution at the time the court makes its decision.*" (*Ibid.*, emphasis added.)

It is apparent from these comments that Congress expected section 672(a)(4)(B)(ii) to give section 672(a)(4)(B)(i) a slight retroactive effect and bring in some of those unfortunate children who had been placed with a foster family prior to the enactment of the 1967 amendments but, because of an earlier failure to obtain AFDC benefits, would not without this language have been

entitled to federal foster care payments. In addition, as the committee pointed out, section 672(a)(4)(B)(ii) would cover the emergency situation where a child had to be placed in foster care before official action could be taken, as – using the example given by the committee – where both parents die suddenly. In either of those two cases "[t]he child need not live with a relative and may be in a foster family home or in a voluntary institution at the time the court makes its decision" and still qualify for federal foster care payments – as long as all of the other qualifying factors were in place within six months. (H.R.Rep. No. 544, *supra* at p. 101.) Missing from the legislative history is any suggestion that section 672(a)(4)(B)(ii) was designed to apply the situation we are faced with here, where the parent or other legal guardian abandons the child *with relatives* who can themselves obtain AFDC with respect to the child, and DCFS is either not called in or does not act before more than six months had gone by.

B

The Department urges that we defer to its expertise or that of the United States Department of Health and Human Services, and accept their interpretation as true and correct. The simple response to that contention is that "final interpretation of a statute is a question of law and rests with the court. [Citations.]" (*Department of Water & Power* v. *Energy Resources Conservation & Development Com.* (1991) 2 Cal.App.4th 206, 220; accord, *Dyna-Med, Inc.* v. *Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1389.)

Moreover, the circumstances under which deference typically takes place are absent from the record here. "The *contemporaneous* construction of a new enactment by the administrative agency charged with its enforcement . . . is entitled to great weight. [Citations.]" (*Dyna-Med, Inc., supra,* 43 Cal.3d at pp. 1388-1389, emphasis added.) The Department regulations to which our attention has been drawn appear to have been promulgated on October 1, 1991, decades after passage of the federal act.

Insofar as the federal agency is concerned, we are directed to a 1994 decision of the appellate division of the United States Department of Health and Human Services arising out of a New York case. Not only does this decision fail the temporal test, but it gives no particular insight into the opinion of the entire agency, as it is not a formal regulation, adopted after notice and hearing. We are, therefore, not bound to give it special consideration. (See, e.g., *Jones* v. *Tracy School Dist.* (1980) 27 Cal.3d 99, 107; *City of Los Angeles* v. *Los Olivos Mobile Home Park, supra,* 213 Cal.App.3d at p. 1433.)

"In any event, administrative construction of a statute, while entitled to weight, cannot prevail when a contrary legislative purpose is apparent. [Citations.]" (*Pacific Legal Foundation* v. *Unemployment Ins. Appeals Bd.* (1981) 29 Cal.3d 101, 117.) Our task, first and foremost, "is to ascertain the intent of the Legislature so as to effectuate the purpose of the law." (*Dyna-Med, Inc., supra,* 43 Cal.3d at p. 1386.) " '[T]he objective sought to be achieved by a statute as well as the evil to be prevented is of prime consideration. . . . ' " (*People ex rel. S.F. Bay etc. Com.* v. *Town of Emeryville* (1968) 69 Cal.2d 533, 543.)

The single theme which permeates the subject statute and its legislative history is that "foster family care is more costly than care in the child's home" and that "courts may be reluctant to place a child in foster care because Federal funds are not available. . . . " (H.R.Rep. No. 544, *supra*, at p. 101.) "AFDC-FC payments are greater than basic AFDC, upon recognition that foster children have greater needs and foster care is more costly than care for children in the parental home. [Citation.]" (*King* v. *McMahon* (1986) Cal.App.3d 648, 653, citing *Ramos* v. *Montgomery* (S.D.Cal. 1970) 313 F.Supp. 1179, 1181-1182, affd. 400 U.S. 1003.)

Section 672(a)(4)(A) and (a)(4)(B)(i) appear on their face to require only that the child be receiving or be eligible to receive AFDC payments when the petition for removal is filed. As AFDC can be obtained through a relative other the one from whom removal is sought, physical residence with the parent or guardian appears to be irrelevant. If the Department is to be believed, a child left in limbo for six months because the parent has abandoned him or her with someone who was not the official custodian or because the county failed to file a petition after removing the child from parental custody within six months, is a child forever disqualified. This makes very little sense. We can imagine no reason why Congress would establish a system where an abused and neglected child's need for foster care payments is measured by the actions or inactions of the parent from whom custody is being wrested, other adults who do not have legal custody, or the county's department of children's services. If Congress had intended to draw a distinction between

needy children living with their parents and needy children abandoned by their parents and create a sort of statute of limitations within which the abandoned child's benefactors must act or forever lose the right to federal foster care benefits, surely it would have said so directly.

The objective of ensuring that greater funds be available to ensure the proper care of abused and neglected children is best achieved by construing section 672(a)(4)(A) and (a)(4)(B)(i) in accordance with their plain words rather than by searching for a construction which would exclude many abandoned children. Congress, by not including the language linking federal foster care benefits to the parent or legal guardian which the Department would have us read into section 672(a)(4)(A) and (a)(4)(B)(i), intentionally focused on the needs of the child rather than the circumstances of the abusive and neglectful parent, and made all children entitled to or receiving AFDC eligible for federal foster care payments.

Section 672 requires that states make federal foster care payments available for children "who would meet the requirements of section 606(a) of this title or of section 607 of this title but for his removal from the home of a relative (specified in section 606(a) of this title). . . ." (§ 672(a).) The children here would have met the section 606(a) requirements but for their removal. When the petitions to remove the children were filed, each of the children was a "dependent child" by virtue of the "continued absence from the home . . . of a parent. . . ." (§ 606(a)(1).) In addition as we have seen, the removal occurred pursuant to a judicial determination that continuation would be contrary to the welfare of the child and reasonable

efforts to prevent the need for removal were made, meeting section 672(a)(1); the children's placement and care were the responsibility of DCFS, the public agency with whom the Department had an agreement, meeting section 672(a)(2); the children were placed in a foster family home as the result of the judicial determination, meeting section 672(a)(3); and at the time the petition to remove from custody was initiated, each child "received [AFDC] aid under the State plan approved under section 602 of this title" as required by section 672(a)(4)(A).

The trial court's rulings that the children qualified for federal foster care payments under the federal statute were correct.

II

The Department challenges the amount of attorney's fees awarded in the Land and Lopez writ proceedings. We note from the record that petitioner Lopez sought $39,279 representing 114.8 hours of attorney time billed at $250 and $145, nine hours of paralegal time billed at $75, and a 1.5 multiplier. Petitioner in Land sought $22,492.50, representing 79.2 hours of attorney time billed at $250, $200, and $145 and a 1.5 multiplier. The court awarded fees based on the actual hours worked with no multiplier, or $26,186 and $14,995, respectively.

The standard for review of a trial court's award of attorney's fees is abuse of discretion, "which will be found only where no reasonable basis for the court's action is shown. [Citation.]" (*Citizens Against Rent Control v. City of Berkeley* (1986) 181 Cal.App.3d 213, 233.) The amounts awarded by the court in the Land and Lopez

matters were substantiated by the evidence presented by petitioners and their attorneys. Moreover, spending a total of approximately 200 hours on the two petitions does not appear to us to be excessive given the novelty of the issues presented and the need for exhaustion of administrative remedies. We see no basis for overturning the trial court's determination in this regard.

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

BARON, J.

We concur:

VOGEL (C.S.), P.J. EPSTEIN, J.

APPENDIX B

NO. S062420

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

CAPITOLA LAND, Plaintiff and Respondent, v. ELOISE ANDERSON, et al., Defendants and Appellants.	2 Civil No. B094688 (L.A.S.C. Case No. BS027127)
MARIA LOPEZ, Plaintiff and Respondent, v. ELOISE ANDERSON, et al., Defendants and Appellants.	(L.A.S.C. Case No. BS030821)
JEAN McCRUMBY, Plaintiff and Respondent, v. ELOISE ANDERSON, et al., Defendants and Appellants.	(L.A.S.C. Case No. BS028418)

PETITION FOR REVIEW
OF DECISION OF THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION FOUR

DANIEL E. LUNGREN
Attorney General of the State of California
CHARLTON G. HOLLAND
Assistant Attorney General
JOHN H. SANDERS
Supervising Deputy Attorney General
ROBIN T. GERTLER, State Bar No. 128413
Deputy Attorney General
300 S. Spring Street, 9th Floor, North Tower
Los Angeles, California 90013
Telephone: (213) 897-2439

Attorneys for Appellants

NO. S062420

IN THE SUPREME COURT OF THE
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CAPITOLA LAND, Plaintiff and Respondent, v. ELOISE ANDERSON, et al., Defendants and Appellants.	2 Civil No. B094688 (L.A.S.C. Case No. BS027127)
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JEAN McCRUMBY, Plaintiff and Respondent, v. ELOISE ANDERSON, et al., Defendants and Appellants.	(L.A.S.C. Case No. BS028418)

PETITION FOR REVIEW
OF DECISION OF THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION FOUR

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND TO THE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Eloise Anderson, Director of the Department of Social Services, and the California Department of Social Services, defendants below and appellants on appeal, respectfully petition this Honorable Court for review of the May 20, 1997 published decision of the Court of Appeal, Second Appellate District, Division Four. A copy of that opinion is attached to this petition as Appendix I.

ISSUE PRESENTED FOR REVIEW:

Whether the Court of Appeal erred in holding that the Aid to Families with Dependent Children ("AFDC") linkage requirement, a requirement for the federal Aid to Families with Dependent Children-Foster Care ("AFDC-FC") Program, set forth in Title 42, United States Code, section 672(a)(4), is satisfied if a child receives AFDC benefits with a foster care relative in the month the juvenile court petition removing the child from his or her home was initiated, when such a holding is contrary to the federal statute?

NECESSITY FOR REVIEW

Under California Rules of Court, Rule 29, subdivision (a)(1), this Court may grant review where it appears necessary to secure uniformity of decision or to settle an important issue of law. In the instant case, the Court of Appeal's decision modifies the AFDC linkage requirement enacted by Congress in Title 42, United States Code section 672, subdivision (a)(4). Review by the Supreme Court is therefore necessary to secure the resolution of an important question of law relating to the proper interpretation of this statute.

The repercussions of this case are manifold. First, the issue posed to this Court may have significant fiscal consequences for the State of California, as well as the various counties which also contribute funding to the AFDC-FC program. (Welf. & Inst. Code, § 15200.) As a result of the Court of Appeal's decision, the State of California, as well as the various counties throughout the state, will be forced to pay the higher monthly AFDC rate for thousands of children who are not eligible under the express terms of the federal statute.[1]

In addition, the Court of Appeal's decision invalidates the Department of Social Services' regulations implementing the linkage requirement, which are in total conformity with Title 42, United States Code section 672, subdivision (a)(4), as well as with the interpretation reached by the United States Department of Health and Human Services. Since the Court of Appeal's decision forces the state to administer the AFDC-FC program in a manner contrary to federal law, the state is at risk of losing federal funding. (42 U.S.C. § 671.)

Review of the Court of Appeal decision is also warranted because the decision ignores the statutory scheme set forth in Title 42, United States Code section 672(a)(4), as well as the interpretations reached by other Courts. Based upon the reasons stated more fully below, the

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[1] The AFDC-FC rate is paid at a higher monthly rate than the regular AFDC rate. (See *King v. McMahon* (1986) 186 Cal.App.3d 648, 653 [230 Cal.Rptr. 911, 913] review denied Jan. 15, 1987.)

issues raised in the instant case are of statewide importance which merit review by this Court. (Cal. Rules of Court, rule 29(a)(1).)

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This case presents a matter of first impression in California, and one of widespread interest due to its effect on the federal AFDC-FC program, administered by Eloise Anderson, as Director of the California Department of Social Services. (Welf. & Inst. Code, §§ 10553, 11400.)

The federal AFDC-FC Program is part of the regular Aid to Families with Dependent Children ("AFDC") Program. (42 U.S.C. § 670 et seq.)[2] The AFDC-FC Program, set forth in Title IV-E of the Social Security Act, is "[f]or the purpose of enabling each State to provide, in appropriate cases, foster care and transitional independent living programs for children who otherwise would be eligible for assistance under part A of this subchapter and adoption assistance for children with special needs. . . ." (42 U.S.C. § 670.)[3] Pursuant to the AFDC-FC Program, the

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[2] The Director of the California Department of Social Services is charged with the responsibility of administering two foster care programs. One is funded by the state and counties. (Welf. & Inst. Code, § 11200 et seq.) The other is a joint state-federal program which is partially funded by the federal government. (42 U.S.C. § 672.) This federal program is at issue in the instant case and will be referred to as the "AFDC-FC" Program.

[3] Part A of Subchapter IV (Grants to States for Aid and Services to Needy Families with Children and for Child-Welfare

Director of the Department of Social Services, through the county welfare departments, provides cash grant payments ("benefits") to those children who meet the eligibility requirements set forth in Title 42, United States Code, section 672.

The federal AFDC-FC program is a federal matching grant program. (42 U.S.C. § 671.) It is partially funded by the federal government and administered by the state. (*King v. McMahon* (1986) 186 Cal.App.3d 648, 653 [230 Cal.Rptr. 911, 913] review denied Jan. 15, 1987.) Fifty percent (50%) of the funds for this program come from the federal government, twenty percent (20%) come from the state and thirty percent (30%) come from the counties. (Welf. & Inst. Code, § 15200.)

However, in order to receive federal funding for this program, the state is required to follow federal law, regulations and guidelines in administering the AFDC-FC program. (42 U.S.C. § 671; *Norman v. McMahon* (1990) 225 Cal.App.3d 1450, 1455 [275 Cal.Rptr. 698].) Pursuant to Title 42, United States Code section 671, in order to receive federal funding, the state was required to implement a plan approved by the United States Department of Health and Human Services which meets the requirements set forth in Title 42, United States Code section 672. Where a state is not in compliance with the program's requirements as determined by the United States Department of Health and Human Services, the federal agency charged with the administration of the federal AFDC-FC

Services) is the Aid to Families with Dependent Children Program.

program, federal funding may be withheld. (45 C.F.R. §§ 201.6; 1355.30, subd. (e); 42 U.S.C. § 671.)

The Department of Social Services has enacted regulations for the AFDC-FC program, which are set forth in Division 45 of the Department's Manual of Policies and Procedures ("MPP").[4] Consistent with Title 42, United States Code section 672, subdivision (a)(4), the Department's regulations require the child to be "linked" to the AFDC program during the month the petition leading to the child's placement in foster care was filed. (MPP § 45-202.3.) In order to meet the linkage requirement, the child must be eligible for AFDC with the parent or relative from whom removed. (MPP § 45-202.31.) The regulations further require the child to have lived with the parent or relative from whom removed within six months of the initiation of the petition. (*Ibid.*) These regulations were included in the state's Title IV-E of the Social Security Act plan, which was approved by the federal government.

In accordance with the Department's regulations, the Los Angeles County Department of Children's Services ("county") determined that respondents were ineligible for AFDC-FC benefits because they did not meet the linkage requirement set forth in MPP section 45-202.313. This decision was upheld by the Director of the Department of Social Services.

Respondents filed Petitions for Writ of Mandate challenging appellants' decisions in Los Angeles County

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[4] The Manual of Policies and Procedures is maintained separately from the California Code of Regulations.

Superior Court. (Land C.T., p. 1; Lopez C.T., p. 1; McCrumby C.T., p. 1.)[5] The superior court issued judgments granting the Petitions for Writ of Mandate on May 24, 1995 in *Lopez v. Anderson*, on June 5, 1995 in *Land v. Anderson* and on September 19, 1995 in *McCrumby v. Anderson*. (Land C.T., p. 93; Lopez C.T., p. 116; McCrumby C.T., p. 225.) In granting the Petitions for Writ of Mandate, the superior court held that the Department's regulations conflict with Title 42, United States Code section 672(a)(4). (Land C.T., p. 97; Lopez C.T., p. 119; McCrumby C.T., p. 229.) The superior court further held that the children at issue qualify for AFDC-FC benefits pursuant to section 672, subdivision (a)(4) because " . . . they were living with a relative specified in 42 U.S.C. § 606(a) and receiving AFDC in the month in which court proceedings were instituted to legally remove them from their mother's custody. . . . " (*Ibid.*) Furthermore, appellants were ordered to cease using MPP sections 45-202.311 through 45-202.313 in determining eligibility for federal foster care benefits. (Land C.T., p. 98; Lopez C.T., p. 120; McCrumby C.T., p. 231.)

Appellants appealed these rulings. (Land C.T., p. 101; Lopez C.T., p. 123; McCrumby C.T., p. 239.) On appeal, appellants argued that in order to be linked to the AFDC Program for purposes of federal foster care eligibility, Title 42, United States Code section 672, subdivision (a)

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[5] The three cases involved in the underlying action were *Land v. Anderson*, L.A.S.C. Case Number BS027127, *Lopez v. Anderson*, L.A.S.C. Case Number BS030821 and *McCrumby v. Anderson*, L.A.S.C. Case Number BS028418. On November 22, 1995, these cases were ordered consolidated by the Court of Appeal pursuant to appellants' motion.

requires that a child be linked to the AFDC program *with the parent or relative from whom removed* during the month the removal petition was filed. Appellants further argued that where the child was not living with the relative from whom removed during the month the petition was filed, the child must have lived with that relative within six months of the initiation of the petition. (42 U.S.C. § 672(a)(4).)

The Court of Appeal, focusing on subdivision (4)(A) of section 672 and ignoring subsection (a) of section 672, affirmed the superior court's judgments. (Appendix I.) Relying upon the 1961 version of section 672, subdivision (a)(4), the Court of Appeal held " . . . the plain text of the 1961 version required only that the children be receiving AFDC benefits in the month in which the petition was initiated and contained no express obligation that the children receive such benefits while physically residing with the parent or relative from whom removed." (Opinion, p. 14.) Accordingly, the Court of Appeal determined that section 672, subdivision (a)(4) does not require a child to be linked to the AFDC Program with the parent or relative from whom removed. (*Ibid.*)

The Court of Appeal's decision is wrong. It is contrary to the intent of Congress, as evidenced by a plain reading of the entire statutory scheme, the legislative history behind the statute and the federal government's interpretation of the federal requirements for the AFDC-FC program. Not only does the effect of the Court of Appeal's decision require the State of California to pay out the higher AFDC-FC rate for thousands of children who do not meet the eligibility requirements set forth in the federal statute, but in addition, the Court of Appeal's

decision places the state out of compliance with federal law. This may result in the loss of federal funding for this Program. Accordingly, the Court of Appeal's decision will have a substantial negative fiscal impact on the State of California, as well as the various counties throughout the state.

ARGUMENT

I

THE QUESTION PRESENTED IN THIS CASE IS SUFFICIENTLY IMPORTANT TO WARRANT THIS COURT'S REVIEW

In the instant case, we are dealing with a state welfare program of enormous fiscal dimensions. For instance, for the 1995-1996 fiscal year, the AFDC-FC Program cost taxpayers approximately $703,676,233.00 in foster care grant payments. (See Appendix II.)[6] In addition, the number of AFDC-FC recipients continues to grow annually. (See Appendix III.) Although the incremental

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[6] Appellants respectfully move that this Court take judicial notice of a document entitled Foster Care Expenditures provided by the Estimates Branch of the California Department of Social Services and a publication entitled *Public Welfare in California* of the Statistical Services Bureau of the Department of Social Services pursuant to Evidence Code section 452, subdivision (h). (Appendices II and III.) It should be noted that the publication set forth in Appendix III includes both the state and federal AFDC programs.

cost of paying the higher AFDC-FC rate may appear small with regard to an individual recipient, the potential financial impact of the Court of Appeal's decision on the State of California and the various counties, is substantial to a program of this fiscal magnitude.[7] In addition, in situations where it is determined that the linkage requirement is not met because the children did not live in the home of removal within six months of the initiation of the petition, the State of California may be forced to bear this massive financial burden without federal financial assistance.[8]

This case is also important because the Court of Appeal ignored the entire statutory scheme surrounding the linkage requirement set forth in Title 42, United States Code section 672, subdivision (a)(4) and interpreted the linkage requirement in a manner contrary to that intended by Congress. The statutory scheme surrounding

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[7] Of the approximately 105,000 children in foster care, it is estimated that approximately 20,000 of these children are receiving monthly AFDC-Family Group benefits. A significant portion of these children, if not most, will now be eligible for the higher monthly AFDC-FC payments.

[8] As the Department argued to the Court of Appeal, the federal government interprets the linkage requirement in the same manner as does the Department. Pursuant to the interpretation of the United States Department of Health and Human Services, which is totally consistent with the statutory language set forth in section 672(a)(4), in order to meet the linkage requirement set forth in section 672(a)(4), the child must have been eligible for AFDC with the parent or relative from whom removed and the child must have lived with that parent or relative within six months of the initiation of the petition.

the AFDC-FC Program supports the interpretation reached by appellants and the United States Department of Health and Human Services that in order to be linked to the AFDC program for purposes of AFDC-FC eligibility, the child must be eligible for AFDC with the parent or relative from whom removed in the month the petition was filed and must have lived with that parent or relative within six months of the initiation of the petition removing the child from that home. (MPP § 45-202.31.) In holding that the home of removal is irrelevant for purposes of establishing linkage and that the child is linked to the AFDC program as long as he or she receives AFDC with any relative during the month petition is filed, the Court of Appeal's decision modifies the federal statute, the result of which may have significant fiscal consequences for the State of California. (See Opinion, p. 14.) As the Court of Appeal substituted its judgment for that of Congress, the issue raised in this case is sufficiently important to warrant review.

II

THE COURT OF APPEAL'S DECISION DISREGARDS THE THE EXPRESSED LEGISLATIVE INTENT SET FORTH IN TITLE 42, UNITED STATES CODE SECTION 672(a)(4)

Review should be granted by the Court in order to settle an important question of law – the proper interpretation of the AFDC linkage requirement set forth in Title 42, United States Code section 672, subdivision (a)(4). The Court of Appeal's decision invalidates the Department of Social Services' regulations which are in

total conformity with a plain reading of section 672, subdivision (a)(4), as well as with the federal government's interpretation of the linkage requirement.

Pursuant to Title 42, United States Code section 672, subdivision (a), AFDC-FC benefits are available to children who would be eligible for regular AFDC benefits but for their removal from the home of a parent or relative as long as they meet the requirements set forth in sections 672(a)(1) through 672(a)(4). The "linkage" requirement at issue in this case is set forth in Title 42, United States Code section 672, subdivision (a)(4). That statute provides:

> "Each State with a plan approved under this part shall make foster care maintenance payments (as defined in section 675(4) of this title) under this part with respect to a child who would meet the requirements of section 606(a) of this title or of section 607 of this title but for his removal from the home of a relative (specified in section 606(a) of this title), if –
>
> " . . .
>
> "(4) such child-
>
> "(A) received aid under the State plan approved under section 602 of this title in or for the month in which such agreement was entered into or court proceedings leading to the removal of such child from the home were initiated, or
>
> "(B)(i) would have received such aid in or for such month if application had been made therefor, or (ii) had been living with a relative specified in section 606(a) of this title within six

> months prior to the month in which such agreement was entered into or such proceedings were initiated, and would have received such aid in or for such month if in such month he had been living with such relative and application therefor had been made."[9]

In order to ensure compliance with section 672, subdivision (a)(4), the Department of Social Services implemented regulations which require the child to be linked to the AFDC program during the month the petition which led to the child's placement in foster care was initiated. (MPP § 45-202.311-45-202.313.) Pursuant to the Department's regulations, the linkage requirement is met if, during the month in which the petition was filed, one of the following conditions exist: 1) the child was living in the home of the parent or relative from whom removed and was eligible for, and received AFDC benefits (MPP § 45-202.311); 2) the child was living in the home of the parent or relative from whom removed and would have been eligible for AFDC benefits had an application been made (MPP § 45-202.312); or 3) the child was not living with the parent or relative from whom removed, but had lived with that parent or relative within six months prior to the month the removal petition was filed in juvenile

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[9] Title 42, United States Code section 606(a) defines a "dependent child" as " . . . a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home . . . or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home. . . . "

court and the child would have been eligible for AFDC benefits based upon that parent or relative's home had he or she been living there and an application was made. (MPP § 45-202.313.)[10]

In the instant case, the Court of Appeal held that a child who receives AFDC with a foster care relative during the month the juvenile court petition removing the child from his or her home was initiated satisfies the requirements set forth in Title 42, United States Codes section 672, subdivision (a)(4). (Opinion, pp. 14, 20.) The Court of Appeal rejected the Department's arguments that the child had to be eligible for AFDC with the parent or relative from whom legally removed, not the foster care relative, and that the child was required to have lived with the parent or relative from whom removed within six months of the initiation of the petition. (Opinion, pp. 14, 20.) However, the Court of Appeal's decision is based upon an erroneous interpretation of section 672, subdivision (a)(4).

It is well established that "[l]egislative intent is not to be ascertained from isolated parts or sections of a statute or act; rather 'a specific provision should be construed with reference to the entire statutory system of which it is a part, in such a way that the various elements of the overall scheme are harmonized.'" (*Griffith v. Gibson* (1977) 73 Cal.App.3d 465, 469-470 [142 Cal.Rptr 176].) In addition, "[e]ach provision [of a statute] must be construed with reference to the entire statutory scheme." (*People v.*

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[10] As previously mentioned, the Department's regulations were set forth in the state's plan, which was approved by the United States Department of Health and Human Services.

American Bankers Ins. Co. (1991) 233 Cal.App.3d 561, 569 [284 Cal.Rptr. 617].)

In determining that AFDC linkage, for purposes of AFDC-FC eligibility, does not have to be based upon the home of removal as long as the child is eligible for AFDC with the foster care relative, the Court of Appeal ignored the statutory language set forth in section 672, subdivision (a). This subdivision clearly provides that a child's eligibility for AFDC-FC benefits is based upon AFDC eligibility with the relative from whom the child was removed.

Specifically, Title 42, United States Code section 672, subdivision (a) provides for federal foster care payments to children who would be eligible for AFDC " . . . but for [their] removal from the home of a relative (specified in section 606(a) of this title), if [the requirements set forth in subsections (a)(1) through (a)(4) are met." Accordingly, the focus of the federal foster care program is on children who will lose AFDC eligibility when they are removed from their homes. (42 U.S.C. § 672(a).) Pursuant to a plain reading of Title 42, United States Code section 672, subdivision (a), the "relative specified in section 606(a)" is referring to the relative from whom the child was removed and with whom the child would have been eligible for AFDC, but for the child's removal from the custody of that relative. (*Ibid.*)

Although the children at issue in these cases were living with relatives specified in section 606(a) while in foster care, and were eligible for AFDC with these foster care relatives at the time the petitions were filed, section 672, subdivision (a) states that eligibility for federal foster

care benefits is based upon AFDC eligibility with the relative from whom removed. (*Ibid.*)[11]

The Director's interpretation of the linkage requirement is further supported by *Miller v. Youkim* (1979) 440 U.S. 125 [59 L.Ed.2d 194, 99 S.C. 957]. In discussing the requirements set forth in section 672, subdivision (a)(4), the Court in *Miller* stated in order to meet the linkage requirement, " . . . the child must have been eligible for categorical assistance [AFDC] under the State's plan *prior* to initiation of the removal proceedings. [Citation.]" (*Id.*, at p. 135; emphasis added.) Similarly, the Court in *King v. McMahon, supra,* 186 Cal.App.3d at p. 654, stated "[t]o be eligible for foster care benefits under the federal program the child must have been receiving or eligible for 'AFDC-FG' (family group) or 'AFDC-U' (unemployment) *prior to foster care placement.* [Citation.]" (Emphasis added.)

Based upon the foregoing, section 672, subdivision (a) requires the child to have been eligible for AFDC with the parent or relative from whom removed. When subdivision (4)(A) is read in conjunction with subdivision (a) of section 672, the statute requires the child to have received AFDC with the parent or relative from whom removed in or for the month the petition was filed. (42 U.S.C. § 672, subd. (a)(4)(A).)

In order to have received AFDC with the parent or relative from whom removed at the time the petition was

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[11] In the *McCrumby* and *Land* cases, the children were living with their grandmothers at the time the petitions removing them from their homes were filed. In the *Lopez* case, the children were living with their aunt.

filed, as mandated by section 672, subdivision (a)(4)(A), the child would have to have lived with that parent or relative in a place of residence maintained by that relative as his or her own home. (42 U.S.C. § 606, subd. (a).) Accordingly, the Court of Appeal's conclusion that section 672, subdivision (a)(4)(A) " . . . require[s] only that the children be receiving AFDC benefits in the month the petition was initiated and contain[s] no express obligation that the children receive such benefits while physically residing with the parent or guardian from whom they were removed" is erroneous.[12]

The Court of Appeal's decision is also flawed because it is based upon the faulty premise that the 1961 Act only required that the child receive AFDC with some relative, in this case the foster care relative, in the month which the removal petition was filed. (Opinion, p. 14.) However, as with the current statute, the 1961 statute also required the child to have actually received AFDC with the parent or relative from whom removed *and* to have lived with that relative in the same month the removal petition was filed.[13]

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[12] Similarly, section 672, subdivision (a)(4)(B)(i), when read in its entirety, provides for AFDC linkage if the child would have received AFDC with the parent or relative from whom removed had an application been made. This also would require the child to have lived in the home of removal at the time the petition was filed. (42 U.S.C. § 606, subd. (a).) However, where the child is not living in the home of removal during the month the petition is filed, as in the instant cases, Title 42, United States Code section 672, subdivision (a)(4)(B)(ii) requires the child to have lived with the parents or relative from whom removed within six months of the initiation of the petition.

[13] The current statute also provides for AFDC linkage where the child would have been eligible to receive AFDC in the

As set forth in the Court's decision, the 1961 statute provided federal foster care payments to those children "' . . . 1) who would meet the requirements of such section 404(a) or 407 except for his removal after April 30, 1961, from the home of a relative (specified in such section 406(a)) as a result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child, (2) for whose placement and care the state or local agency administering the state plan approved under section 402 is responsible, (3) who has been placed in a foster family home as a result of such determination, and (4) *who received aid under such state plan in or for the month in which court proceedings leading to such determination were initiated. . . .* ' [Citation.]" (Opinion, p. 13, emphasis in original.)

Again, as is emphasized in the Court of Appeal's opinion, the Court focussed only on the language set forth in number four (4) of the statute and simply concluded that a child "who received aid under such state plan in or for the month in which court proceedings leading to such determination were initiated." (*Ibid.*) In doing so, the Court of Appeal ignored the language set forth in number one (1), which focusses on AFDC eligibility with the relative from whom the child was removed. (*Ibid.*)[14] Accordingly, the Court of Appeal's

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home of removal, had an application been made (42 U.S.C. § 672(a)(4)(B)(i)), and where the child had lived in the home of removal within six months of the initiation of the petition and would have been eligible for AFDC during the month the petition was filed (42 U.S.C. § 672(a)(4)(B)(ii).)

[14] As previously argued, in order to have received aid with the relative from whom removed, the child would had to have

interpretation of the linkage requirement is also contrary to the 1961 version of the statute.

The Court of Appeal's analysis regarding the 1967 amendments is also flawed. The Court of Appeal determined that section 672(a)(4)(B)(i) and section 672(a)(4)(B)(ii) were primarily intended to expand foster family care payments to those situations where the child would have been eligible for aid had the family applied; and secondarily, to cover situations where a child who would have been eligible for AFDC in the home of removal, had the family applied, is placed in foster care with a non-relative prior to the petition being filed. (Opinion, pp. 14, 16, 17.)

The Department does not dispute that section 672, subdivision (a)(4)(B)(i) was intended to eliminate " . . . the distinction between indigent children actually receiving AFDC benefits and those entitled to such benefits but who had, for whatever reason, failed to obtain them." (Opinion, p. 14.) However, the Court of Appeal erred in determining that the application of section 672, subdivision (a)(4)(B)(ii) is limited to emergency situations where the child was placed with a non-relative before official action could be taken. (Opinion, pp. 16-17.)

A review of the legislative history establishes that in 1967, section 672, subdivision (a)(4)(B)(ii) was enacted in order to provide funding to those children who were eligible for AFDC in the home of removal but who were not living in the home of removal at the time the petition

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lived with that relative when aid was received. (42 U.S.C. § 606, subd. (a).)

was filed, such as those children "whose parents are killed and for whom the court does not take immediate jurisdiction." (McCrumby C.T., p. 107, 141-142.) Also included in this category are " . . . some children already in foster care at the time of this legislation and who, except for this provision, would not be eligible because they had already been removed from their homes." (*Ibid.*)

Pursuant to section 672, as it existed prior to 1967, these children would not have been linked to the AFDC Program because they were not in the home of removal at the time the petition was filed. (*Ibid.*) The Court of Appeal, however, determined that Congress did not intend for section 672, subdivision (a)(4)(B)(ii) to apply to situations where a child is eligible for AFDC with a relative in foster care because the House Ways and Means Committee stated that " . . . '[t]he child need not live with a relative and may be in a foster family home or in a voluntary institution at the time the court makes its decision' and still qualify for federal foster care payments. . . . " (Opinion, pp. 16-17.)

Appellants do not dispute that a child may be eligible to receive AFDC-FC benefits while living with a non-relative in foster care or where the child is placed in foster care prior to the court's granting of the removal petition. However, the legislative history does not indicate that Congress intended to limit section 672, subdivision (a)(4)(B)(ii) to situations where the child was living with a non-relative at the time the petition was filed and therefore would not be able to meet the AFDC linkage requirement pursuant to Title 42, United States Code section 606(a). (McCrumby C.T., pp. 107, 141-142.) In addition, Title 42, United States Code section 672, subdivision (a)(4) does not differentiate between children

placed with non-relatives and those placed with relatives at the time the petition was filed in determining the home with which the child must be eligible for AFDC. Pursuant to Title 42, United States Code section 672, subdivision (a), linkage to the AFDC Program is always based upon AFDC eligibility in the home from which the child was removed, regardless of whether the child is placed with a relative or non-relative in foster care.

In construing a statute, the courts " . . . can neither add a qualification that the legislature has not imposed, nor ignore one that it has provided." (*Joseph v. Superior Court* (1992) 9 Cal.App.4th 498, 508-509 [11 Cal.Rtpr.2d 757].) In this case, Congress has expressly based linkage to the AFDC Program upon the home of removal. (42 U.S.C. § 672, subd. (a).) However, the Court of Appeal, in reading subdivision (4)(A) of section 672 in isolation, while ignoring subdivision (a) of section 672, has interpreted the statute in a manner contrary to that intended by Congress. Should this decision be allowed to stand, it will have significant fiscal impact upon the State of California and the various counties.

CONCLUSION

The issue presented by this case has important legal and fiscal implications which warrant review by this Court. The Court of Appeal in acting contrary to the intent of Congress, places a new financial burden on state

and county budgets. Accordingly, appellants respectfully request that review by this Court be granted.

DATED:

Respectfully Submitted,

DANIEL E. LUNGREN,
Attorney General
of the State of California
CHARLTON G. HOLLAND, III
Assistant Attorney General
JOHN H. SANDERS, Supervising
Deputy Attorney General
ROBIN T. GERTLER,
Deputy Attorney General

By: _____
ROBIN T. GERTLER

Attorneys for Appellants

APPENDIX C

Second Appellate District, Division Four,
No. B094688, S062420

IN THE SUPREME COURT OF CALIFORNIA

CAPITOLA LAND, Et Al., Respondents

v.

ELOISE ANDERSON, Appellant

(Filed Jul. 30, 1997)

Petition for review DENIED.

GEORGE
Chief Justice

APPENDIX D

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

CAPITOLA LAND, Petitioner, vs. ELOISE ANDERSON, in her capacity as Director, DEPARTMENT OF SOCIAL SERVICES, Respondent.	CASE NO. BS 027127 STATEMENT OF DECISION (Filed Jun. 5, 1995)

The petition for writ of mandate is granted pursuant to Code of Civil Procedure Sections 1085 and 1094.5. In exercising its independent judgment, the Court finds the respondent has not proceeded in the manner required by law and the respondent's decision is not supported by the evidence.

The petitioner, CAPITOLA LAND, is the foster parent of her granddaughter, Sade. On October 30, 1991 the respondent, through the County of Los Angeles, filed a petition in juvenile court to have Sade removed from the care and custody of her mother. Sade was physically residing with the petitioner in the month that the petition was filed. It is undisputed that Sade was receiving AFDC benefits in the month that the petition was filed.

There are three separate ways that children can establish "linkage" to qualify for federal foster care benefits under 42 U.S.C. § 672(a)(4). The respondent's regulation, Manual of Policy and Procedure Section 45-202.311-313 conflicts with federal law since it mandates that children must either have lived with the relative from whom they were removed in the month that the removal petition is filed, or alternatively within six months prior to the month that a juvenile petition is filed. There is no such requirement under federal law.

The petitioner qualifies for federal foster care benefits pursuant to 42 U.S.C. § 672(a)(4)(A) since Sade received AFDC in the month in which court proceedings were instituted legally removing her from her mother's home. Since the purpose of the federal foster care program is to protect and support abused and abandoned children, the Social Security legislation enacting it should be liberally construed in favor of the petitioner avoiding the narrow legalistic interpretation that the respondent suggests since that interpretation is not in furtherance of Congressional intent and the remedial and beneficial purposes for which the act was amended. See e.g., *Smith v. Vowell* (W.D.Tex. 1977) 379 F. Supp. 139, 151-152, aff'd, (5th Cir. 1974) 504 F.2d 759. A State that participates in the federal foster care program may not deny assistance to persons who meet eligibility standards defined in the Social Security Act unless Congress clearly has indicated that the standards are permissive. *Miller v. Youakim* (1979) 440 U.S. 126, 134.

The interpretation of "home" that the respondent has proposed to the Court is not "clearly" what Congress has

indicated in the federal statute even by the respondent's own prior interpretation of the statute[1] so it is rejected.

The respondent is hereby ordered to grant the petitioner retroactive foster care benefits plus legal interest[2], at the rate of 10%, from September, 1992 to the present. The respondent is entitled to deduct any payments made to the petitioner under the AFDC program from the retroactive foster care payments due.

The respondent is ordered to cease utilizing Manual of Policy and Procedure § 45-202.311-313 to determine eligibility for federal foster care payments. The respondent shall determine the "linkage" requirements of the federal foster care program in accordance with 42 U.S.C. § 672(A)(4).

The petitioner shall recover reasonable attorneys' fees and costs in this proceeding pursuant to Welfare & Institutions Code § 10962. The amount of reasonable attorneys' fees and costs to be recovered shall be determined by a separate noticed motion.

Dated: 6/5/95

/s/ Robert H. O'Brien
Honorable Robert H. O'Brien
Superior Court Judge

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[1] See Department of Social Services, All County Letter No. 92-33, Subject: *Home of Removal – Federal Aid to Families With Dependent Children – Foster Care Program*, attached as Exhibit A to the petitioner's reply brief filed on April 20, 1995.

[2] The petitioner is entitled to interest pursuant to Civil Code § 3287 (a). See *Aguilar v. California Unemployment Insurance Appeals Board* (1990) 223 Cal.App.3d 239.

APPENDIX E

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

MARIA LOPEZ, Petitioner, vs. ELOISE ANDERSON, in her capacity as Director, DEPARTMENT OF SOCIAL SERVICES, Respondent.	CASE NO. BS 030821 STATEMENT OF DECISION (Filed May 24, 1995)

The petition for writ of mandate is granted pursuant to Code of Civil Procedure Sections 1085 and 1094.5. In exercising its independent judgment, the Court finds the respondent has not proceeded in the manner required by law and the respondent's decision is not supported by the evidence.

The petitioner, MARIA LOPEZ, is the foster parent of two of her sister's children, Evelyn R. and Iliana R. (the children). On August 12, 1993 a petition to legally remove the children from their mother's home and legal custody was filed. The children were physically residing with the petitioner in the month that the petition was filed. It is undisputed that the children were receiving AFDC benefits in the month that the petition was filed.

There are three separate ways that children can establish "linkage" to qualify for federal foster care benefits under 42 U.S.C. § 672(a)(4). The respondent's regulation, Manual of Policy and Procedure Section 45-202.311-313 conflicts with federal law since it mandates that children must either have lived with the relative from whom they were removed in the month that the removal petition is filed, or alternatively within six months prior to the month that a juvenile petition is filed. There is no such requirement under federal law.

The children qualify for federal foster care benefits pursuant to 42 U.S.C. § 672(a)(4)(A) since they received AFDC in the month in which court proceedings were instituted legally removing them from their mother's home. Since the purpose of the federal foster care program is to protect and support abused and abandoned children, the Social Security legislation enacting it should be liberally construed in favor of the petitioner avoiding the narrow legalistic interpretation that the respondent suggests since that interpretation is not in furtherance of Congressional intent and the remedial and beneficial purposes for which the act was amended. See e.g., *Smith v. Vowell* (W.D.Tex. 1977) 379 F. Supp. 139, 151-152, aff'd, (5th Cir. 1974) 504 F.2d 759. A State that participates in the federal foster care program may not deny assistance to persons who meet eligibility standards defined in the Social Security Act unless Congress clearly has indicated that the standards are permissive. *Miller v. Youakim* (1979) 440 U.S. 126, 134.

The interpretation of "home" that the respondent has proposed to the Court is not "clearly" what Congress has

indicated in the federal statute even by the respondent's own prior interpretation of the statute[1] so it is rejected.

The respondent is hereby ordered to grant the petitioner retroactive foster care benefits plus legal interest[2], at the rate of 10%, from September, 1993 to the present. The respondent is entitled to deduct any payments made to the petitioner under the AFDC program from the retroactive foster care payments due.

The respondent is ordered to cease utilizing Manual of Policy and Procedure § 45-202.311-313 to determine eligibility for federal foster care payments. The respondent shall determine the "linkage" requirements of the federal foster care program in accordance with 42 U.S.C. § 672(A)(4).

Petitioner shall recover reasonable attorneys' fees and costs pursuant to Welfare & Institutions Code § 10962. The amount of reasonable attorneys' fees and costs to be recovered shall be determined by a separate noticed motion.

Dated: 5/24/95

/s/ Robert H. O'Brien
Honorable Robert H. O'Brien
Superior Court Judge

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[1] See Department of Social Services, All County Letter No. 92-33, Subject: *Home of Removal – Federal Aid to Families With Dependent Children – Foster Care Program*, attached as Exhibit A to the petitioner's reply brief filed on April 20, 1995.

[2] The petitioner is entitled to interest pursuant to Civil Code § 3287 (a). See *Aguilar v. California Unemployment Insurance Appeals Board* (1990) 223 Cal.App.3d 239.

APPENDIX F

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

JEAN McCRUMBY, Petitioner, vs. ELOISE ANDERSON, in her capacity as Director, DEPARTMENT OF SOCIAL SERVICES, State of California, and the STATE DEPARTMENT OF SOCIAL SERVICES, Respondent.	CASE NO. BS 028418 STATEMENT OF DECISION (Filed Sept. 19, 1995)

The petition for writ of mandate is granted pursuant to Code of Civil Procedure Section 1094.5. In exercising its independent judgment, the Court finds the respondent has not proceeded in the manner required by law and the respondent's decision is not supported by the evidence.

The petitioner, JEAN McCRUMBY, is the foster parent of the six children of her daughter at issue here, namely: Deshone D., Frederick B., George R., Derrick J., Penelope J. and Kenisha H. Petitions were filed to legally remove the children from their mother's custody and declare them dependents of the court as follows:

Deshone, Frederick, George, Derrick – October 26, 1989;

Penelope – May 7, 1991; Kenisha – April 29, 1992.

It is undisputed that the children were under the care and control of the responsible state agency, physically residing with the petitioner and receiving AFDC benefits, in the month their respective removal petitions were filed.

There are three separate ways that children can establish "linkage" to qualify for federal Foster Care benefits under 42 U.S.C. § 672(a)(4). The respondent's regulation, Manual of Policies and Procedures § 45-202.311-.313 conflicts with federal law in that it mandates that children must have lived with the relative from whom they were removed, either in the month the removal petition was filed or within the prior six months. There is no such requirement under federal law.

The children qualify for federal Foster Care benefits pursuant to 42 U.S.C. § 672(a)(4)(A), since they were living with a relative specified in 42 U.S.C. § 606(a) and receiving AFDC in the month in which court proceedings were instituted to legally remove them from their mother's custody, and otherwise meet all the eligibility requirements for those benefits. The purpose of the federal Foster Care program is to protect and support abused and abandoned children. Therefore, the Social Security legislation enacting it should be liberally construed in favor of the petitioner, avoiding the narrow legalistic interpretation suggested by the respondent since that interpretation does not further Congressional intent and the remedial and beneficial purposes for which the act was amended. *See* e.g., *Smith v. Vowell* (W.D. Tex. 1977) 379 F.Supp. 139, 151-152, aff'd, (5th Cir. 1974) 504 F.2d 759. A state that participates in the federal Foster Care program may not deny assistance to persons who meet eligibility standards defined in the Social Security

Act unless Congress clearly has indicated that the standards are permissive. *Miller v. Youakim* (1979) 440 U.S. 126, 134.

The interpretation of "home" proposed by the respondent is not "clearly" what Congress has indicated in the federal statute, even by the respondent's own prior interpretation of the statute,[1] and so it is rejected.

Los Angeles County (County), acting as respondent's agent, acknowledges it took no action to determine whether the petitioner was eligible for federal Foster Care benefits until after the designated state agency had placed six children with her. Even at that time, the record demonstrates that County did not meet its obligation to assist the petitioner in establishing her eligibility for Foster Care benefits on behalf of any of the six children. Because County did not fulfill its mandatory duty, the children were denied the right to a timely determination of their eligibility for Foster Care benefits.

The statutory requirement for filing a removal petition is within 48 hours, or two court days, of an involuntary removal and detention by the county. In the case of Deshone, County's seventeen-month delay is an indefensible failure to comply with state law. Respondent may not use County's failure to comply with a statutory mandate to petitioner's detriment by using such failure to deny

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[1] See Department of Social Services All County Letter No. 92-33: *Home of Removal – Federal Aid to Families With Dependent Children – Foster Care Program*, attached as Exhibit C to Petitioner's Memorandum of Points and Authorities.

eligibility for Foster Care benefits to a child otherwise eligible.

Respondent has recently determined that Derrick, Penelope and Kenisha are eligible for Foster Care benefits. Respondent is ordered to apply that determination effective as of the date of their respective removal petitions.

The respondent is hereby further ordered to grant the petitioner prospective and retroactive Foster Care benefits plus legal interest[2], at the rate of 10%, from the date of their respective petitions, including Derrick, Penelope and Kenisha, to the present. In the case of Deshone, benefits shall be effective as the date of his placement with petitioner. Respondent is entitled to deduct any payments made to the petitioner under the AFDC program for the respective child from the retroactive Foster Care payments due that child.

The respondent is ordered to cease utilizing Manual of Policies and Procedures § 45-202.311-.313 to determine eligibility for federal Foster Care benefits. The respondent shall determine the "linkage" requirement of the federal Foster care program in accordance with 42 U.S.C. § 672(a)(4).

Petitioner shall recover reasonable attorneys' fees and costs pursuant to Welfare & Institutions Code § 10962. The amount of reasonable attorneys' fees and

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[2] The petitioner is entitled to interest pursuant to Civil Code § 3287 (a). *See Aguilar v. California Unemployment Insurance Appeals Board* (1990) 223 Cal.App.3d 239.

costs to be recovered shall be determined by a separate noticed motion.

Dated: SEP 19, 1995 /s/ Diane Wayne
Superior Court Judge

APPENDIX G

Union Calendar No. 207

90TH CONGRESS
1st Session

REPORT
No. 544

HOUSE OF REPRESENTATIVES

SOCIAL SECURITY AMENDMENTS OF 1967

AUGUST 7, 1967. – Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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MR. MILLS, From the Committee on Ways and Means, Submitted the following

REPORT

[To accompany H.R. 12080]

The Committee on Ways and Means, to whom was referred the bill (H.R. 12080) to amend the Social Security Act to provide an increase in benefits under the old-age, survivors, and disability insurance system, to provide benefits for additional categories of individuals, to improve the public assistance program and programs relating to the welfare and health of children, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

* * *

B. PUBLIC WELFARE

1. *Aid to families with dependent children*

Your committee has become very concerned about the continued growth in the number of families receiving aid to families with dependent children (AFDC). In the last 10 years, the program has grown from 646,000 families that included 2.4 million recipients to 1.2 million families and nearly 5 million recipients. Moreover, according to estimates of the Department of Health, Education, and Welfare, the amount of Federal funds allocated to this program will increase greatly (from $1.46 billion to $1.84 billion) over the next 5 years unless constructive and concerted action is taken now to deal with the basic causes of the anticipated growth. Although the growth which has occurred can be accounted for, in part, by the inclusion in the program of assistance to the children of the unemployed (added in 1961 on an optional basis to the States) and to increases in the child population, a very large share of the program growth is due to family breakup and illegitimacy.

Your committee is very deeply concerned that such a large number of families have not achieved independence and self-support, and is very greatly concerned over the rapidly increasing costs to the taxpayers. Moreover, your committee is aware that the growth in this program has received increasingly critical public attention.

It is now 5 years since the enactment of the 1962 legislation, which allowed Federal financial participation in a wide range of services to AFDC families – services which your committee was informed and believed would help reverse these trends – and your committee has had

an opportunity to assess its effect on the status of the AFDC program. While the goals set for the program in 1962 were essentially sound, those amendments have not had the results which those in the administration who sponsored the amendments predicted. The provisions for services in the 1962 amendments have been implemented by all the States, with varying emphasis from State to State as to which aspects receive the major attention. There have been some important and worthwhile developments stemming from this legislation. The number of staff working in the program has increased so that the caseworkers have smaller, more manageable caseloads. The volume of social services has increased and some constructive results have been reported. It is also obvious, however, that further and more definitive action is needed if the growth of the AFDC program is to be kept under control.

Your committee has studied these problems very carefully and is now recommending several coordinated steps which it expects, over time, will reverse the trend toward higher and higher Federal financial commitments in the AFDC program. The overall plan which the committee has developed, with the advice and help of the Department of Health, Education, and Welfare, amounts to a new direction for AFDC legislation. The committee is recommending the enactment of a series of amendments to carry out its firm intent of reducing the AFDC rolls by restoring more families to employment and self-reliance, thus reducing the Federal financial involvement in the program. These changes are –

(1) A requirement that all States establish a program for each appropriate AFDC adult and

older child not attending school with a view to getting each of them equipped for work and placed in jobs. Those members of the family who refuse without good cause to accept training or employment would be cut off the rolls. (Children would not have to be cut off the rolls but the adults would not get payments.) The programs would also be designed to reduce the incidence of illegitimacy and to strengthen family life.

(2) A requirement that all States have an earnings exemption to provide incentives for work by AFDC recipients.

(3) All requirement that all States establish community work and training programs throughout the State by July 1, 1969.

(4) A requirement that protective payments and vendor payments be made where appropriate to protect the welfare of children.

(5) A provision to freeze (insofar as Federal financing participation is concerned) the largest AFDC category – where the parent is absent from the home – at present proportions of each State's child population.

(6) A more definitive program of aid to the children of the unemployed.

(7) A requirement that all States establish programs to combat illegitimacy.

(8) A requirement that all States furnish day-care services and other services to make it possible for adult members of the family to take

training and employment. Family planning services would be offered to all appropriate recipients, and other services which would help make the family self-supporting.

(9) A program of emergency assistance for families for a temporary period.

(10) A requirement that State welfare agencies refer cases of child abuse or neglect to appropriate law-enforcement agencies and courts.

(11) A requirement that the States establish separate units to enforce the child-support laws, including financial help to the courts and prosecuting agencies to enforce court orders for support.

(12) Federal payments for additional foster care situations under the AFDC program.

(a) Program for each adult recipient. – Under the bill, the local welfare agency would be required to establish a program for each adult (and each appropriate child over the age of 16 who is not attending school) with the objective of (1) placing such individuals in employment, and (2) preventing or reducing the incidence of illegitimate births, and otherwise strengthening family life.

(1) Analysis of employability potential. – Obviously, much is to be gained, both by the recipients themselves and the community at large, if the full employment potential of the AFDC group is realized and these families can be returned to financial independence as quickly as possible. Your committee believes that a great many mothers, as well as virtually all unemployed fathers, of

AFDC children can be trained for and placed in productive employment. Your committee is well aware that this potential can be realized only with careful planning and with the development of appropriate training, educational, child care, and related resources on the part of the State and local welfare agency.

Your committee recognizes the serious social, vocational, and educational handicaps of many of the recipients and knows that much careful and patient work will be needed in order to accomplish the objectives of the bill. In some instances steps will be needed to upgrade the level of homemaking, child care, and the basic educational capacity of the mother in order to get her ready to profit by training. The committee expects that social services already authorized under the 1962 legislation will be effectively used to attain those goals. In addition to testing, basic education, job training, and special job development, the plan may provide for homemaker services, individual and group counseling, and medical services.

Your committee is concerned that the plan for each family be kept current and that the State be held responsible, as a condition for continued Federal grants, for carrying out the plan and for making necessary adjustments. Under the bill, the plan must be examined, updated, and assessed as to its effectiveness in dealing with the individual problems of the family as frequently as needed but not less than once a year.

(2) Family and child welfare services. – In the implementation of the program for each adult, the State would be expected to provide the social services indicated in the

plan, including family planning services, needed to achieve the goals of the program – prevention of illegitimacy, and strengthening of family life. Family planning services are to be offered to the recipient and, in accordance with statements on this subject previously issued by the Secretary of Health, Education, and Welfare, can be accepted or rejected in accordance with the dictates of the individual's religion or conscience. The term "family services," under your committee's bill, is defined to include services to preserve, rehabilitate, reunite, or strengthen the family. The term includes services which are specifically designed to assist the family members to attain or retain capability for maximum self-support and personal independence.

Your committee is aware that in a few States child welfare services are in separate organizational units from services offered through the unit providing services to public assistance recipients. This separation, whether it occurs on the State level or in the local unit of the welfare department, diminishes the prospect of the State being able to concentrate the available help for the families that need this help. For this reason, the bill provides that the services under the requirement for a plan for each family must be provided by a single State and local agency by July 1, 1969.

Your committee believes that many mothers of children on AFDC would like to work and improve the economic situation of their families if they could be assured of good facilities in which to leave their children during working hours. In addition to other provisions which will provide incentives to work and training and

related services, the bill would contribute very substantially to the financing of day care facilities for the children of working mothers (or homemaker services if such an arrangement is more satisfactory). In addition, your committee believes that it may be worthwhile for the States to work out arrangements under which some mothers on AFDC can care for the children (and get paid for it) of other AFDC mothers who take other jobs. (Your committee is aware that this is an ideal dating back to the 1930's, but urges the States to experiment with this and other methods to bring these families into the mainstream of American economic life.) It is expected that in 1970 (when it is assured that the full plan will be in effect in virtually all the States) some $207 million in Federal, State, and local funds will be needed to meet the costs of day care. But for every expense for day care, there will be a mother at work or in training who could not otherwise be there.

Under the bill, the States would submit reports to the Secretary showing the results of their experience with the programs for each adult for stimulating employment and strengthening family life. The Secretary, in turn, would publish his findings of the programs developed by the States and would be required to submit an annual report to the Congress (beginning not later than July 1, 1970) on the programs developed and administered by the States. The report would include such factors as the number of recipients for whom training or employment was found feasible, the frequency with which the programs were reviewed and revised; the extent to which, in the opinion of the States and the Secretary, the programs contributed to making families economically independent; the extent

to which family planning services have been offered and accepted; and other pertinent factors, information, and recommendations which the Congress could use in assessing the effectiveness of these provisions.

(3) Financing necessary services. – Your committee is well aware that the services which the States will be required to furnish AFDC families will impose an additional financial burden on the States. Therefore, the provisions of law relating to Federal financial participation would be amended by your committee bill to provide 75 percent Federal financial participation in the cost of all the services provided under these requirements to the recipients of the program.

In addition, as is provided under present law, 75 percent Federal sharing would be available for services for applicants and families that are near dependency. Provision of such services can help families to remain self-supporting. As appropriate for this purpose, services may be made available to those who need them in low-income neighborhoods and among other groups that might otherwise include more AFDC cases.

Seventy-five percent Federal matching would also continue to be available to help meet the cost of training staff who are employed by the State or local agency or who are preparing for such employment.

The 1962 amendments relating to social services provide that, with certain exceptions, the basic services must be provided by the staff of the State or local welfare agency. The committee bill proposes some changes in this provision to take into account the need for a variety of services in State implementation of the plan for each

family. Thus, an exception is permitted, to the extent specified by the Secretary, to permit child welfare, family planning, and other family services to be provided from sources other than the staff of the State and local agency. This will permit the purchase of day-care services, which, as indicated above, the committee anticipates will be needed in great volume under the bill, and other specialized services not now available or feasible to be provided by the staff of the public welfare agency and which are available elsewhere in the community. Services may be provided by the staff of the State or local agency in some part of the State and may be provided in other parts of the State by purchase. The Secretary, in his standards governing this aspect of the program, may permit purchase from other agencies and institutions. The basic reason for the exception is the variety of existing arrangements around the country in which some kinds of services are now provided, usually institutional services, by other than the State or local public welfare agency.

The matching ratio for these various services would be 85 percent up to July 1, 1969, for State plans complying with the new requirements before that date, in order to encourage earlier implementation of these provisions in those States where it is feasible.

(b) Referral to courts. – Your committee's bill would add a plan requirement on the relationship of the public welfare agency to the courts and law enforcement officials. Under present law, the States are required to report to the appropriate law enforcement officials the granting of assistance to any child who is made eligible by the desertion or abandonment by his parent. This provision has not been broad enough to accomplish objectives

which the committee believes are essential – securing support from the deserting or abandoning parent in every possible case. There needs to be a cooperative arrangement between the courts and law enforcement officials and the welfare agencies in several program areas. The agreement should cover the manner in which referrals are made to the court when the welfare agency believes the child's home is unsuitable because of neglect, abuse, or exploitation of a child. The agreement should also provide for calling the attention of the law enforcement agencies to such instances and giving all necessary information to the appropriate law enforcement officials. Thus, for example, if an AFDC mother is not caring properly for her children, the matter would quickly come to the attention of the courts and appropriate action taken, including the possibility of placing the children in foster care.

The agreement might appropriately cover other areas of joint interest between the welfare agencies and the courts and the law enforcement agencies including the manner of referral to the welfare agency of instances of dependency and the need for public social services coming to the attention of the courts and law enforcement officials.

(c) Foster care in AFDC. – Your committee believes that some children now receiving AFDC would be better off in foster homes or institutions than they are in their own homes. This situation arises because of the poor home environment for child upbringing in homes with low standards, including multiple instances of illegitimacy. Foster care for children is relatively costly, and States have reported that they cannot finance it without

some additional Federal help. This [provision] of care for children is frequently the responsibility of local government rather than State government. There are two limited sources for Federal funds for this program. Under the AFDC program, as amended in 1961, Federal funds are available for the care of children in foster family care or in voluntary institutions if they were recipients of AFDC when they were removed from their home by a court. This part of the program is a small one with approximately 9,000 children currently aided under these provisions. In addition, the States may use part of their Federal child welfare grants under part 3 of the title V of the Social Security Act for foster care costs. Only small sums are actually available from these latter grant funds for this purpose because of the great demands for other services.

Your committee is aware of the limitations on the provision described above for foster care through the AFDC program when children are removed from their home by court order. For the State to receive any Federal sharing, the children must be recipients of AFDC when the court issues its order. Your committee believes that this is an unduly limiting restriction and is proposing that this limitation be changed. There is some evidence that courts may be reluctant to place a child in foster care because Federal funds are not available (and the cost of the care must come out of local funds in many areas) unless the child is in the home of a specified relative. The proposed change would make the cost of caring for children in foster care subject to Federal sharing if the child has been placed in foster care by a court order (if the child is removed from the home of a relative as a result of

a judicial determination that continuation in such home would be contrary to his welfare) and if the child would have been eligible for aid under the AFDC program if an application had been made on his behalf. Also included are children placed under court order who had been living with one of the specified relatives enumerated in the law within 6 months and would have been eligible upon application for AFDC if he were living with such relative and were removed from the home of such relative by order of the court. This latter group would include some children already in foster care at the time of this legislation and who, except for this provision, would not be eligible because they had already been removed from their homes. Temporary plans may be needed, for example, for children both of whose parents are killed in an accident and for whom the court does not take immediate jurisdiction. The child need not live with a relative and may be in a foster family home or in a voluntary institution at the time the court makes its decision.

Your committee believes that the AFDC program already offers an opportunity for States to receive Federal financial assistance in the cost of care for many children who have no parents or who are not able to live with their parents. Under AFDC, children are eligible for assistance only if they are living with one or more specified relatives. Thus, if children are deprived of parental support or care for the reasons now available to States under title IV, Federal sharing is available to meet the cost. It is not necessary for the relatives who, under State law, are not legally responsible for support, to meet the test of need applicable under the State AFDC plan, if they are caring for children who are eligible under the plan.

Federal sharing is available to reimburse the relative for the cost of providing a home for the child. Your committee believes that greater use could be made of these present provisions of the AFDC program in this respect in order to obtain the best possible environment for the child.

Under the committee bill, Federal funds will be available on a more liberal basis than for the basic program out of a recognition that foster family care is more costly than care in the child's home. Effective July 1, 1969, State plans would have to provide for foster care under these terms. Federal sharing will be possible up to $100 a month (on an average basis) for children in foster care. Your committee believes that these liberalizations will be of material assistance to States and localities and will facilitate plans being developed for children based on the need of the child rather than the fiscal condition of the local government.

90TH CONGRESS) SENATE) REPORT
1st Session)) No. 744

SOCIAL SECURITY AMENDMENTS OF 1967

NOVEMBER 14, 1967. – Ordered to be printed

MR. LONG of Louisiana, from the Committee on Finance, submitted the following

REPORT

TOGETHER WITH MINORITY VIEWS

[To accompany H.R. 12080]

The Committee on Finance, to which was referred the bill (H.R. 12080) to provide an increase in benefits under the old-age, survivors, and disability insurance system, to provide benefits for additional categories of individuals, to improve the public assistance program and programs relating to the welfare and health of children, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill do pass.

I. BRIEF SUMMARY OF THE BILL

The proposals embodied in H.R. 12080 as reported by the committee could make major improvements in the provisions of the Social Security Act relating to the old-age, survivors, and disability insurance program, the hospital and medical insurance programs, the medical assistance program, the aid to families with dependent

children, and other public assistance programs and the child welfare and child health programs.

Old-Age, Survivors, and Disability Insurance

The bill would increase social security benefits of the 23.8 million elderly and disabled people, widows and orphans receiving benefits and would improve the protection of the old-age, survivors, and disability insurance provisions of the social security program, by providing –

(1) An across-the-board benefit increase of 15 percent for people on the rolls, with a minimum monthly primary insurance amount of $70;

(2) An increase in the earnings base from $6,600 to $8,000 in 1968, $8,800 in 1969, and $10,800 in 1972.

(3) An increase from $35 to $50 in the special payments now provided for certain people age 72 and older who have not worked long enough to qualify for regular cash benefits;

(4) An increase from $1,500 a year to $1,680 in 1968, and to $2,000 in 1969 and thereafter, in the amount that an individual may earn in a year and still get full benefits;

(5) Actuarially reduced benefits at age 60 for both men and women;

(6) Liberalized insured-status requirements and a liberalized definition of disability for disability insurance benefits for the blind;

(7) New guidelines for determining when a disabled worker cannot engage in substantial gainful activity;

(8) An alternative insured-status requirement for workers disabled before age 31;

(9) Monthly cash benefits for disabled widows and disabled dependent widowers;

(10) A new definition of dependency for children of women workers;

(11) Additional wage credits for military service; and

(12) Other improvements in the social security cash benefits program.

Health Insurance

The bill would improve the health insurance benefits now provided to the aged under the medicare legislation of 1965, would extend the protection of health insurance, and would simplify administration, by providing –

(1) Coverage of additional days of hospital care;

(2) For coordination of hospital insurance reimbursement with planning by States under the Partnership for Health Act;

(3) Authority for experiments to achieve greater economy without reduction in quality of care, through various alternatives for reimbursement of hospitals, physicians, and others providers of health services;

(4) Retroactive payment to patients of a percentage of the charges for services rendered by nonparticipating hospitals with respect to admissions occurring before 1968;

(5) Payment to patients of a percentage of the charges for emergency hospital services, and

redefinition of hospitals eligible to provide covered emergency services;

(6) For the inclusion under the medical insurance plan of certain services of podiatrists, chiropractors, and optometrists;

(7) Elimination of the requirement that a physician certify to the medical necessity of admissions to general hospitals and of outpatient hospital services;

(8) A procedure for paying the patient supplementary medical insurance benefits on the basis of an itemized, non-receipted bill;

(9) Extension of medical insurance coverage through elimination of the deductible and coinsurance provisions applicable to inpatients for pathology and radiology services, and simplification of hospital billing by transferring coverage of outpatient hospital diagnostic services to the supplementary medical insurance program and by permitting hospitals to collect charges from outpatients for relatively inexpensive services;

(10) Modification of the medical insurance enrollment periods;

(11) For a study by the Secretary of Health, Education, and Welfare of certain legislative proposals which would (1) cover prescription drugs under medicare, and (2) establish, through a formulary committee, quality and cost control standards for drugs provided under the various Federal-State assistance programs and the hospital insurance part of medicare; and

(12) Other miscellaneous improvements.

Financing the Social Insurance Program

The cost of the changes would be met through the existing financing and through an increase in the earnings base from $6,600 to $8,000 in 1968, $8,800 in 1969, and $10,800 in 1972 and through an increase in the tax rates. In the future there would be increases in the tax rates. As a result, the system would be in close actuarial balance.

Aid to Families With Dependent Children

The bill would make the following reforms in the aid to families with dependent children programs:

(1) For the purpose of providing greater incentives for appropriate members of families drawing aid to families with dependent children (AFDC) payments to obtain employment so that they need no longer be dependent on the welfare rolls the bill would –

(a) Exempt a portion of earned income for members of the family who can work;

(b) establish a new work incentive and training program for individuals to be administered by the Department of Labor upon referral by the State welfare agency;

(c) require State welfare agencies to assure adequate child care arrangements for the children of working mothers;

(d) require the State welfare agencies to establish a social service plan for each AFDC family; and

(e) modify the optional unemployed fathers program to provide for a uniform definition of unemployment throughout the United States.

In order to enable the States to implement these requirements, the Federal Government would supply Federal matching for services (including child welfare and day care) which the States would be required to furnish. Federal matching would also be provided for training, supervision, materials, and other items and services needed in the work incentive program.

(2) To aid in the reduction of births out of wedlock, and to prevent the neglect, abuse, and exploitation of children, the bill would require the States –

(a) To provide family planning services which would be offered on a voluntary basis in all appropriate cases;

(b) To institute protective payments to an interested person to assure that the child rather than an incompetent or irresponsible parent or relative receives the benefit of assistance, or to provide direct vendor payments, where it is determined the cash payments to the parent or relative would be detrimental to the welfare of the child;

(c) To bring unsuitable home conditions of children to the attention of the courts or law-enforcement agencies; to develop a program through a single organizational unit to establish paternity of needy children (in order to get support payments from the fathers); to utilize reciprocal support arrangements with other States to enforce court support orders for deserted children; and to enter into cooperative arrangements with the court to carry out these arrangements. Also, to assist in the runaway

fathers problem, the services and powers of the Federal tax collector would be used to locate fathers and to require them to make payments to their abandoned children in compliance with support orders of local courts or incur a liability to the U.S. Government.

The bill provides more favorable Federal matching and broadens eligibility for foster care for children removed from an unsuitable home by court order. Moreover, certain requirements that have restricted the use of protective payments would be removed and vendor payments would be authorized for the first time in the cash program. Finally, a new program optional with he States would authorize dollar-for-dollar Federal matching to provide temporary assistance to meet the great variety of situations faced by needy children in families with emergencies.

Public Assistance

To expand and improve the operation of the public assistance programs, the bill would –

(1) Require the States to guarantee that old-age, blind, and disabled recipients will receive, on an average, an additional $7.50 a month in total income (either assistance or social security payments);

(2) Require the States by July 1, 1969, to provide a more liberal earnings exemption under public assistance programs;

(3) Extend and expand the public assistance demonstration grant program;

(4) Initiate a program of grants to educational institutions to expand undergraduate and graduate social work training; and

(5) Provide Federal matching for essential home repairs of a limited nature for homes owned by public assistance recipients.

Child Welfare Services

To expand and improve the operation of the child welfare programs, the bill would –

(1) Increase the authorization for child welfare services to provide more foster care and day care services; and

(2) Combine child welfare services administratively within State agencies so as to coordinate welfare services under the AFDC program.

Medical Assistance (Medicaid)

To modify the program of medical assistance by establishing certain limits on Federal participation in the program and to add flexibility in administration, the bill would –

(1) (a) Impose an outside limitation on the individuals for whom medical expenses would be subject to Federal matching at an income level related to 150 percent of the old-age assistance standard and (b) substantially reduce the Federal matching share for assistance provided the medically indigent;

(2) Allow States, as to the medically indigent, (a) a broader choice of required health services under the program; (b) the option of imposing

deductibles or cost-sharing requirements as to inpatient hospital care;

(3) Exempt from the requirement of "comparability" for all recipients the benefits "bought-in" for the aged under the medicare supplementary medical insurance program;

(4) Allow recipients free choice of qualified providers of health services;

(5) Allow, at the option of the States, direct payments to recipients to meet the cost of physicians' and dentists' services;

(6) Extend assistance to certain spouses of assistance recipients who are essential to their welfare;

(7) Require the States, as a condition of participation in the program, to have a professional medical audit program and to license only nursing homes which meet certain conditions; and

(8) Establish an Advisory Council on Medical Assistance to advise on administration of the program.

* * *

B. Public Welfare

1. Aid to Families With Dependent Children

Like the Committee on Ways and Means of the house, this committee has become concerned about the continued growth in the number of families receiving aid to families with dependent children (AFDC). In the last 10 years, the program has grown from 646,000 families that included 2.4 million recipients to 1.2 million families and

nearly 5 million recipients. Moreover, according to estimates of the Department of Health, Education, and Welfare, the annual amount of Federal funds allocated to this program will increase greatly (from $1.46 billion to $1.84 billion) over the next 5 years unless constructive and concerted action is taken now to deal with the basic causes of the anticipated growth. Although the growth which has occurred can be accounted for, in part, by the inclusion in the program of assistance to the children of the unemployed (added in 1961 on an optional basis to the States) and to increases in the child population, a very large share of the program growth is due to family breakup and births out of wedlock.

We are very deeply concerned that such a large number of families have not achieved and maintained independence and self-support, and are very greatly concerned over the rapidly increasing costs to the taxpayers. Moreover, we are aware that the growth in this program has received increasingly critical public attention.

It is now 5 years since the enactment of the 1962 legislation, which allowed Federal financial participation in a wide range of services to AFDC families – services which the Congress was informed and believed would help reverse these trends. The provisions for services in the 1962 amendments have been implemented by all the States, with varying emphasis from State to State on which aspects receive the major attention. There have been some important and worthwhile developments stemming from this legislation. The number of staff working in the program has increased so that the caseworkers have smaller, more manageable caseloads. The volume of social services has increased and some constructive

results have been reported. It is also obvious, however, that further and more definitive action is needed if the growth of the AFDC program is to be kept under control.

The plan which the committee has developed, with the advice and help of the Department of Health, Education, and Welfare and the Department of Labor, amounts to a new direction for AFDC legislation. It follows the basic outline of the bill passed by the House but incorporates certain desirable changes in the method of administration and program emphasis. The committee is recommending the enactment of a series of amendments to carry out its intent of reducing the AFDC rolls by restoring more families to employment and self-reliance.

The first series of amendments is designed to encourage and make possible the employment of adults in AFDC families. Three provisions are aimed at this purpose:

(1) The establishment of a work incentive program under the Department of Labor for the purpose of restoring members of AFDC families (including those with little or no work experience) to regular employment through counseling, placement, services and training, and arranging for all others to get paid employment in special work projects to improve the communities in which they live;

(2) A requirement that all States furnish day-care services and other social services to make it possible for adult members of the family to take advantage of the work and training opportunities under the work incentive program; and

(3) A requirement that all States exempt part of the AFDC recipient's earnings to provide incentives for work in regular employment.

The second series of amendments would set up new protections for the children in AFDC families and would make more certain the fulfillment of parental responsibilities;

(1) A requirement that the States establish a comprehensive plan of social services for each AFDC child to assure the child the maximum opportunity to become a productive and useful citizen;

(2) A requirement that State welfare agencies refer cases of child abuse or neglect to appropriate law-enforcement agencies and courts;

(3) A requirement that protective payments and vendor payments be made where appropriate to protect the welfare of the children;

(4) Federal payments for additional foster care situations under the AFDC program;

(5) A requirement to assure that fathers who desert or abandon their families will contribute to the support of their families by using available tax records and the enforcement power of the Internal Revenue Service. In addition, there would be a requirement that the States establish separate units to enforce the child-support laws, including financial help to the courts and prosecuting agencies to enforce court orders for support; and

(6) A program of emergency assistance to families with minor children for a temporary period.

(7) A more definitive and uniform program for the children of unemployed fathers.

The third series of amendments would make other changes in the program designed to deal with the expanding AFDC rolls.

(1) A requirement that all States establish programs to reduce the number of children born out of wedlock; and

(2) A requirement that all the States offer family planning services to appropriate AFDC recipients.

* * *

(g) Foster care in AFDC

The committee believes that some children now receiving AFDC would be better off in foster homes or institutions than they are in their own homes. This situation arises because of the poor home environment for child upbringing in homes with low standards, including multiple instances of births out of wedlock. Foster care for children is relatively costly, and States have reported that they cannot finance it without some additional Federal help. This item of care for children is frequently the responsibility of local government rather than State government. There are two limited sources for Federal funds for this program. Under the AFDC program, as amended in 1961, Federal funds are available for the care of children in foster family care or in voluntary institutions if they were recipients of AFDC when they were removed from their home by a court. This part of the program is a small one with approximately 9,000 children currently aided under these provisions. In addition, the States may use part of their Federal child welfare grants under part 3

of title V of the Social Security Act for foster care costs. Only small sums of Federal funds are actually available from these grant funds for this purpose because of the great demands for other services.

The committee is aware of the limitations on the provision described above for foster care through the AFDC program when children are removed from their home by court order. For the State to receive any Federal sharing, the children must be recipients of AFDC when the court issues its order. The committee believes that this is an unduly limiting restriction and is proposing that this limitation be changed. There is some evidence that courts may be reluctant to place a child in foster care because Federal funds are not available (and the cost of the care must come out of local funds in many areas) unless the child is in the home of a specified relative. The proposed change would make the cost of caring for children in foster care subject to Federal sharing if the child has been placed in foster care by a court order (if the child is removed from the home of a relative as a result of a judicial determination that continuation in such home would be contrary to his welfare) and if the child would have been eligible for aid under the AFDC program if an application had been made on his behalf. Also included are children placed under court order who had been living with one of the specified relatives enumerated in the law within 6 months and would have been eligible upon application for AFDC if he were living with such relative and were removed from the home of such relative by order of the court. This latter group would include some children already in foster care at the time of this legislation and who, except for this provision, would not

be eligible because they had already been removed from their homes. Temporary plans may be needed, for example, for children both of whose parents are killed in an accident and for whom the court does not take immediate jurisdiction. The child need not live with a relative and may be in a foster family home or in a voluntary institution at the time the court makes its decision.

The committee believes that the AFDC program already offers an opportunity for States to receive Federal financial assistance in the cost of care for many children who have no parents or who are not able to live with their parents. Under AFDC, children are eligible for assistance only if they are living with one or more specified relatives. Thus, if children are deprived of parental support or care for the reasons now available to States under title IV, Federal sharing is available to meet the cost. It is not necessary for the relatives who, under State law, are not legally responsible for support, to meet the test of need applicable under the State AFDC plan, if they are caring for children who are eligible under the plan. Federal sharing is available to reimburse the relative for the cost of providing a home for the child. The committee believes that greater use could be made of these present provisions of the AFDC program in this respect in order to obtain the best possible environment for the child.

Under the committee bill, Federal funds will be available on a more liberal basis than for the basic program out of a recognition that foster family care is more costly than care in the child's home. Effective July 1, 1969, State plans would have to provide for foster care under these terms. Federal sharing will be possible in payments up to $100 a month (on an average basis) for children in foster

care. The committee believes that these liberalizations will be of material assistance to States and localities and will facilitate plans being developed for children based on the need of the child rather than the fiscal condition of the local government.

APPENDIX H

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: New York State Department of Social Services
DATE: July 21, 1994

Docket Nos. A-93 – 219
A-94-26
A-94-64
A-94-137
A-94-159

Decision No. 1485

DECISION

The New York State Department of Social Services (New York) appealed determinations by the Administration for Children and Families (ACF) disallowing a total of $101,094,142 in federal financial participation claimed under title IV-E of the Social Security Act (Act) for foster care maintenance payments. The payments were made on behalf of children living in foster care placements with a relative. ACF found that some of the children in a sample from which the disallowances were projected had been living with a relative for more than six months prior to the initiation of the court proceedings that determined that the child should be removed from a prior home because the child's continuance in that home would be contrary to the child's welfare.[1] (We refer to that prior

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[1] According to New York, the children were removed as the result of a court order (rather than a voluntary placement

home as the "contrary-to-the-welfare" home at various times in this decision.) ACF concluded that the children were ineligible for IV-E funding because they were not removed from the contrary-to-the-welfare home as the result of a judicial determination, as required by section 472(a)(1) of the Act. This conclusion was based on ACF's interpretation of section 472(a)(1) as requiring the child's *physical* removal from the contrary-to-the-welfare home. ACF considered a child who was physically removed from the home of a specified relative such as a parent within six months prior to the initiation of court proceedings as removed from home within the meaning of section 472(a)(1).[2] New York disputed ACF's interpretation. New York contended that the child was removed within the meaning of this section at the time the judicial determination was made transferring custody from the child's parent to the state IV-E agency, although the child was physically removed from the home of the parent more

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agreement) in all of the sample cases. New York brief at 18. We therefore focus on the requirements for removal of children as the result of a judicial determination, although the result here would be the same if a child's removal from home occurred pursuant to a voluntary placement agreement executed more than six months after the month of the child's removal.

[2] For simplicity, both parties assumed that the contrary-to-the-welfare home from which each child in question was removed was the home of the child's parent. However, title IV-E speaks in terms of a removal from the home of "a specified relative." Thus, a child who lived with a specified relative other than a parent before residing with the relative with whom the child was ultimately placed by the state agency might qualify for IV-E payments on the basis of the child's removal from the home of that specified parent.

than six months prior to the initiation of the court proceedings.

As explained in detail below, we conclude that ACF's interpretation of section 472 is a reasonable interpretation (and perhaps the only reasonable interpretation) of the language of the statute as a whole. In addition, ACF's interpretation is supported by the legislative history of the title IV-E program and furthers the goals of the program. Contrary to what New York argued, ACF's interpretation did not constitute a legislative rule which had to be issued pursuant to notice and comment rulemaking under the Administrative Procedure Act. Instead, it is an interpretative rule of which New York had timely, actual notice. We also conclude that it was not improper for ACF to disallow a portion of the claims without first deferring or auditing them. However, we uphold the disallowances in principle only since we have not yet considered arguments raised by New York concerning how ACF calculated the disallowance.[3] This decision is based on briefing filed by the parties as well as by the City of New York. The Board permitted the City to participate as an intervenor since the City had a substantial interest in the outcome of the dispute and its participation was likely to sharpen some of the issues presented. Ruling on Intervention dated January 25, 1994. Since the City argued for reversal of the disallowances on essentially the same

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[3] The parties agreed at the outset of the proceedings in this case that briefing on these arguments should be deferred until the Board decided the threshold legal issue. The Board will schedule additional proceedings to consider these arguments if New York so requests within 30 days of its receipt of this decision.

grounds as New York, we attribute to New York all arguments for this result.

Before the parties briefed the substantive issues discussed here, New York requested that the Board dismiss the disallowances on the ground that they were contrary to the moratorium established by section 13716 of the Omnibus Budget Reconciliation Act of 1993. That section provides in pertinent part that the Secretary shall not, before October 1, 1994, "reduce any payment to, withhold any payment from, or seek any repayment from any State under . . . part E [of title IV of the Social Security Act] by reason of a determination made in connection with any on-site Federal financial review. . . . " New York argued that the disallowances were based on such a review. The Board declined to dismiss the appeal, concluding that the moratorium precluded the Secretary only from collecting disallowed funds and that the conduct of Board proceedings did not constitute collection of such funds. Ruling on Request for Dismissal, dated November 18, 1993. The Board also determined that the moratorium did not apply to these disallowances because they resulted from reviews of the quarterly expenditure reports on which the costs were claimed, not from the type of review referred to in section 13716. Accordingly, the Board rejected New York's argument that the moratorium precluded ACF from reducing payments to New York by the amount of the disallowances. Ruling on Request for Reconsideration of Ruling on Request for Dismissal, dated March 10, 1994.

Factual Background

The claims in question were for foster care maintenance assistance expenditures incurred by New York City on

behalf of children in foster care placements with a relative. The expenditures were incurred from July 1, 1988 through September 30 1993.[4] In 1989, ACF became concerned that the claims may have included expenditures for children whom ACF believed were ineligible for IV-E funding because they were not physically removed from home as a result of a court order. ACF therefore requested New York to provide documentation which identified such cases. ACF deferred several claims because New York failed to provide such documentation.

Although New York maintained that title IV-E did not require the child's physical removal, New York proposed to conduct a random sample of New York City foster care cases involving relative placements to determine the percentage of the deferred claims in which there was documentation establishing that the child was physically removed from home. ACF approved the sampling plan, and provided that a child would meet the physical removal requirement if the child lived with a parent or other specified relative, other than the relative with whom he or she was ultimately placed, at some time in the six months preceding the initiation of court proceedings. ACF Ex. 2, Sampling Plan for Review of Federally Deferred Title IV-E Kinship Claims at 3. New York sampled 250 cases, finding that 82% of the claims (after 20

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[4] The amount of each claim and period for which the claim was made are as follows: Docket No. A-93-219 – $71,385,412 for the period July 1, 1988 through December 31, 1992; Docket No. A-94-26 – $6,252,334 for the quarter ended March 31, 1993; Docket No. A-94-64 – $6,172,825 for the quarter ended June 30, 1993; Docket No. A-94-137 – $5,261,006 for the quarter ended September 30, 1993; and Docket No. A-94-159 – $12,022,565 for the period October 1, 1989 through December 31, 1992.

cases were dropped from the sample) were for children whose physical removal could be documented. ACF conducted a re-review of a random subsample of 50 cases and found that 74.5% of the claims were for children whose physical removal could be documented and who were otherwise eligible for IV-E payments. Based on these results, ACF allowed 74.5% of the deferred claims and disallowed the remaining amounts. ACF also disallowed the same percentage of similar claims which had already been paid.

Statutory Background

Under title IV-E of the Act, federal matching of state foster care maintenance payments is available for children in foster care who would otherwise be eligible for AFDC. Prior to the enactment of title IV-E (in the Adoption Assistance and Child Welfare Act of 1980, Public Law No. 96-242), funding for foster care maintenance payments was available under title IV-A. The new title IV-E program (and other amendments made by Public Law No. 96-242) grew out congressional concern that the public child welfare system responsible for serving dependent and neglected children had become a holding system for children living away from their parents. Congress intended "to lessen the emphasis on foster care placement and to encourage greater efforts to find permanent homes for children either by making it possible for them to return to their own families or by placing them in adoptive homes." S. Rep. No. 336, 96th Cong., lst Sess. 1 (1979).

Section 472(a) provides that foster care maintenance payments will be available for –

> a child who would meet the [AFDC eligibility] requirements . . . but for his removal from the home of a relative (specified in section 406(a)), if –
>
> (1) the removal from the home . . . was the result of a judicial determination to the effect that continuation therein would be contrary to the child's welfare . . . ;
>
> (2) such child's placement and care are the responsibility of . . . the State agency administering the State plan approved under section 471 . . . ;
>
> (3) such child has been placed in a foster family home or child-care institution as a result of the . . . judicial determination . . . ;
>
> (4) such child –
>
> (A) received aid under [title IV-A] in or for the month in which . . . court proceedings leading to the removal of such child from the home were initiated, or
>
> (B)(i) would have received such aid in or for such month if application had been made therefor, or (ii) had been living with a relative specified in section 406(a) within six months prior to the month in which . . . such proceedings were initiated, and would have received such aid in or for such month if in such month he had been living with such a relative and application therefor had been made.

The relatives specified in section 406(a) are the child's father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece.

Other relevant statutory provisions are identified later in the decision.

ACF's Interpretation of the "Removal" Requirement

As previously indicated, ACF read section 472(a)(1) of the Act as requiring that the child be physically removed from the home of a specified relative, such as a parent, as a result of a judicial determination. However, ACF found eligible those children whose parents left them with a relative up to six months prior to the initiation of court proceedings which resulted in an order ratifying the child's placement with the relative. This six-month grace period is recognized in two ACF issuances, although neither issuance specifically addresses relative placements. The "Title IV-E Foster Care Checklist Guide" in ACF's "Financial Review Guide for On-Site Reviews of the Title IV-E Foster Care Program" includes the following item (item 15 in the 1985 version, item 16 in the 1991 version):

> a. DATE COURT ORDER INITIATED – The court order removing the child must have been initiated, that is, the petition filed, no longer than six (6) months after the child was removed from the home of a specified relative.
>
> * * *
>
> b. WITHIN 6 MONTHS – If the date of the petition is more than six (6) months after the child's removal, the child is not eligible for [federal funding].

In addition, ACYF-PIQ-89-01, dated February 9, 1989, (issued to clarify the conditions under which an otherwise eligible

child who is voluntarily relinquished to the IV-E agency for the purpose of foster care may subsequently become eligible for IV-E) states in pertinent part:

> If the child had last been living with the parent(s) within six months of the date court proceedings were initiated leading to a judicial determination that remaining in the home would be contrary to the welfare of such child, the removal from the home will be considered a "judicial removal". . . . (sections 472(a)(1) and 472(a)(4)(B)).

ACF's interpretation was also derived in part from ACYF-PIQ-87-04, dated August 13, 1987, issued in response to a "Policy Interpretation Question" raised by ACF's Region II office on behalf of New York. Region II questioned whether a child was eligible for IV-E payments where "[t]he parents have deserted the home in which the child and another relative remain," or "[t]he parent has taken the child to the home of a relative for care and support and has never returned to resume the care of the child," and subsequently "court action was taken to place responsibility for placement and care of the child with the State agency without physically removing the child from the home of the relative."[5] PIQ-87-04, at 2.

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[5] Since the parties developed the facts of only one of the sample cases in question here, we make no judgment as to whether this description covers all the circumstances arising in these cases. In the one case, the grandmother removed the children from their mother, but the mother did not demand the children's return until seven months later, at which time judicial proceedings were initiated which resulted in a court order placing the children with the grandmother. New York Exs. 28 - 32.

The PIQ offered two reasons for concluding that the child was not eligible for IV-E funding. First, the PIQ stated that the definition of "home" in the title IV-A regulations at 45 C.F.R. § 233.90(c)(1)(v)(B) was applicable, "since eligibility for foster care maintenance payments under title IV-E is based upon eligibility for title IV-A. . . . " *Id.* at 3. This provision states that –

> A home is the family setting maintained or in process of being established as evidenced by assumption and continuation of responsibility for day to day care of the child by a relative with whom the child is living. A home exists so long as the relative exercises responsibility for care and control of the child even though either the child or the relative is temporarily absent from the customary family setting.

According to PIQ-87-04, if the parents have left the child with a relative (in their own home or the relative's home), the child's home and customary family setting have been shifted to the home of the relative. Thus, the child is not removed from home when legal custody, or responsibility for placement and care, is later given to the state agency through a voluntary placement agreement or judicial determination. Instead, the only change at that time is the legal status of the child in relation to his absent parents.

Second, the PIQ stated that the "plain meaning of the language" of the Act was that the child must be physically removed from home. The PIQ cited the references in section 472(a) and 472(a)(1) to the child's "removal from the home," as well as the language "has been placed" in section 472(a)(3). The PIQ also cited the language "removed from his or her home" in section 472(e).

Although none of the disallowance letters cited PIQ-87-04 as authority for the disallowance, they all articulated the same interpretation as stated in the PIQ, citing the definition of "home" in the AFDC regulations as authority. ACF specifically cited this PIQ as authority for the disallowances in its briefs in this proceeding.

Analysis

New York took the position that ACF's interpretation of section 472(a)(1) as requiring a physical removal was unreasonable. New York argued that since Congress had ample opportunity to specify in title IV-E that the term "removal" meant physical removal, Congress' failure to do so was evidence that it did not intend to require physical removal. New York also argued that ACF's interpretation frustrated congressional intent to provide IV-E funds for children placed with relatives. In addition, New York argued that ACF's treatment as IV-E eligible of children who were physically removed up to six months prior to the initiation of court proceedings undermined its interpretation. According to New York, the requirement for removal pursuant to a court order simply means that legal custody of the child must be transferred from the child's parents to the state IV-E agency.

As discussed below, however, we find that ACF's interpretation is a reasonable one and may in fact be the only reasonable interpretation. Since ACF gave clear and timely notice of its interpretation in PIQ-87-04, which was

not required to be published pursuant to notice and comment rulemaking, we defer to that interpretation.[6]

1. ACF's interpretation is supported by the language of section 472 as a whole.

Although section 472 does not explicitly describe the removal of a child which is required as a condition of IV-E eligibility as a physical removal, the provisions in section 472 that refer to "removal" clearly contemplate that the child must be physically removed from home within the time frame here specified by ACF.[7]

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[6] The Board and the courts have consistently held that where a statute is subject to more than one interpretation, the federal agency's interpretation is entitled to deference if that interpretation is reasonable, and appropriate notice of that interpretation has been given to the state. *See, e.g., Connecticut Dept. of Children and Youth Services*, DAB No. 1395 (1993); *Pennsylvania Dep't of Public Welfare v. U.S. Department of Health and Human Services*, 928 F. 2d 1378 (3d Cir. 1991). As discussed below in this decision, however, we conclude that the language of the statute as a whole may not even be reasonably subject to more than one interpretation.

[7] Aside from relying on the statutory analysis developed in this section, we also note that ACF's interpretation of the word "removal" in section 472(a) is consistent with the plain meaning of the word. "Remove" is commonly defined as "to change or shift the location, position, station, or residence of." *Webster's Third New International Dictionary* at 1921 (1976). This definition more clearly applies to a change in a child's physical location with respect to the child's parent than a change in the child's legal status. Indeed, if Congress had intended the latter meaning rather than the plain meaning, it likely would have been more explicit in describing the type of "removal" intended.

Section 472(a)(1) provides for foster care payments for a child who would meet all eligibility requirements for AFDC if the child had not been removed from the home of a specified relative as the result of a judicial determination that continuation in the home was contrary to the child's welfare. This section expressly contemplates that the removal of the child from the contrary-to-the-welfare home will cause the loss of the child's existing AFDC eligibility. This cannot occur without a physical removal because a child remains eligible for AFDC as long as the child resides "in a place of residence maintained by one or more [specified] relatives as his or their own home" (assuming other eligibility requirements are met). *See* section 406(a) and equivalent wording in section 407.

Moreover, section 472(a)(4) specifies the month for which the child must establish the AFDC eligibility that is lost by virtue of the child's removal from the home of the relative. It authorizes three options, the first two of which apply where the child was living with the specified relative in the month in which court proceedings were initiated: i.e., either the child must be receiving AFDC in or for the month in which court proceedings leading to the removal of the child from the home were initiated (section 472(a)(4)(A)), or the child would have received AFDC in or for the same month if an application had been made (section 472(a)(4)(B)(i)). The third option applies where the child was not living with the relative in the month in which court proceedings were initiated, in which case the child must have been living with a specified relative within six months prior to that month and would have received AFDC in and for the month court proceedings were initiated if the child had still been

living with the relative in that month and an application for AFDC had been made (section 472(a)(4)(B)(ii)). The effect of the latter provision is to allow a child who had already been removed from the contrary-to-the-welfare home (and who had thus already lost AFDC eligibity prior to the month court proceedings were initiated by virtue of having been removed from that home) to nevertheless qualify for foster care payments if the removal occurred no more than six months prior to the month court proceedings were initiated.

When the foregoing provisions of section 472(a) are read together, they clearly contemplate that the child will be physically removed from the contrary-to-the-welfare home in or after the month in which court proceedings are initiated or within the preceding six months. The child's physical removal from the contrary-to-the-welfare home within that time frame causes the child to lose his or her existing AFDC eligibility, as provided in section 472(a)(1). That AFDC eligibility, moreover, must be established for purposes of title IV-E foster care eligibility by virtue of the child's physical presence in the contrary-to-the-welfare home during the month proceedings are initiated or during the preceding six months, as required by section 472(a)(4). In the sample cases in question here, however, the physical removal occurred more than six months prior to the initiation of court proceedings when the parent left the child with another specified relative. At that point, the child was no longer in the parent's "home" within the meaning of the title IV-A regulations because the parent no longer exercised responsibility for the child's care and control on a day-to-day basis. ACF

reasonably relied on this definition of "home" since section 472(a)(1) specifically refers to title IV-A eligibility requirements.

Thus, ACF's interpretation of "removal" in section 472(a) is not only reasonable, but is arguably the only interpretation which properly effectuates the statue read as a whole. New York's interpretation, on the other hand, is contrary to the intent of section 472(a) since it would afford IV-E eligibility to a child who had not physically resided in the contrary-to-the-welfare home during the period in which AFDC eligibility in that home must be established under section 472(a)(4). Such a child could neither establish AFDC eligibility in that home at the requisite time, nor be physically removed from that home within the time frame contemplated by the statute.[8]

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[8] In addition to section 472(a), other provisions of section 472 provide support for ACF's interpretation and undercut New York's. Section 472(e) of the Act provides that, within 180 days (about six months) of a voluntary placement, there must be a judicial determination that such placement is in the best interest of the child. New York's interpretation would in effect allow it to circumvent this requirement as well as the requirement in section 472(f) that there be a written agreement between the state agency and the child's parents or guardian. The cases in question here arguably involved placements that, while not pursuant to voluntary placement agreements, were nonetheless voluntary since the children were living with relatives with whom the parents had left them, apparently without state agency involvement. There is no evidence that any of the cases in question here had a signed voluntary placement agreement or a judicial determination initiated within six months ratifying the placement.

2. The legislative history supports ACF's interpretation.

The title IV-A foster care program, as amended in 1967, contained a requirement, which was almost identical to section 472(a)(4)(B)(ii), that the child have been eligible for AFDC in the home from which the child was removed prior to the initiation of court proceedings or in the preceding six months. The House and Senate reports on this IV-A provision indicated that the prior requirement that a child must be a recipient of AFDC when the court issues its order was "an unduly limiting restriction." S. Rep. No. 744, 90th Cong., 1st Sess. 164 (1967); H.R. Rep. No. 544, 90th Cong., 1st Sess. 101 (1967). The reports stated that the 1967 amendments would, among other things, make eligible for foster care –

> children placed under court order who had been living with one of the specified relatives enumerated in the law within 6 months and would have been eligible upon application for AFDC if he were living with such relative and were removed from the home of such relative by order of the court. This latter group would include some children already in foster care at the time of this legislation and who, except for this provision, would not be eligible because they had already been removed from their homes. Temporary plans may be needed, for example, for children both of whose parents are killed in an accident and for whom the court does not take immediate jurisdiction.

Id. This provision was later characterized in the report on the Senate version of the 1980 law enacting title IV-E as follows:

> [t]he existing law is written in such a way that emergency placement in foster care can be made and subsequently ratified by judicial determination without losing eligibility for AFDC matching after the determination has been made.

S. Rep. No. 336, 96th Cong., 2nd Sess. 16 (1979). These statements indicate that Congress viewed section 472(a)(4)(B)(ii) as an exception to the requirement that a child be removed from home at the time of or after the judicial determination for children who were the subject of a temporary emergency placement.

The legislative history thus supports ACF's interpretation rather than New York's. ACF here merely applied this exception to the physical removal requirement, which was contemplated by Congress, to relative placements that occurred within six months prior to the month in which court proceedings were initiated. This application of the exception is consistent with the literal language of section 472(a)(4)(B)(ii) as well as with Congress' intent to allow the physical removal to precede the judicial determination only by a short time.

New York relied on the legislative history of amendments to title IV-E made by section 9133 of the Omnibus Budget Reconciliation Act of 1987. This reliance is misplaced. These amendments (codified in sections 472(h) and 475(4)(B) of the Act) provide that foster care maintenance payments made with respect to a minor child who is placed in foster family home or child-care institution with a son or daughter are to include amounts necessary to cover costs incurred with respect to the son or daughter, and that the son or daughter is to be considered a child with respect to whom foster care maintenance payments

are made. The House report indicates that, absent the amendments, foster care maintenance payments would not be available for the child "because the infant technically has not been removed from the home of the parent and placed in foster care." *Id.*, quoting H. Rep. No. 319 (II), 100th Cong., 1st Sess. 909 (1987). This legislative history is consistent with ACF's view that a child must be physically removed from the home of the parent. The legislative history indicates that a special statutory exception was required to provide IV-E funds for an infant who had not been physically removed from the home of a parent who was also placed in foster care.

3. ACF's interpretation furthers the basic goal of title IV-E to return children in foster care to their parents.

ACF's interpretation is also reasonable because it furthers the basic goal of title IV-E to return children to their parents. In order to qualify a child for IV-E funds under this interpretation, a state agency must initiate court proceedings either before the child is physically removed from the home of his or her parent or within the next six months. This gives states an incentive to bring children who have been physically removed from their parents' homes into the foster care system, where they will receive services directed toward the statutory goal of reunifying them with their families. Once a child is under the responsibility of the state agency, the state agency must develop a case plan for the child within 60 days. *See* 45 C.F.R. § 1356.21(d). The case plan must include a description of the services offered and the services provided to prevent removal of the child from the home and to

reunify the family. *Id.* In addition, there must be an administrative or court review of the status of the child no less frequently than once every six months "to determine . . . the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement in foster care, and to project a likely date by which the child may be returned to the home or placed for adoption or legal guardianship. . . . " *See* section 475(5)(B) of the Act. In assuring that the child will be in a position to receive these services on a timely basis, ACF's interpretation furthers the basic statutory goal of reunification.

New York's interpretation, on the contrary, might arguably work against achieving this goal. The longer a child remains away from home, the more difficult efforts to reunite the child with his or her parent might become. Indeed, where a child has been living with a relative on a long-term basis, it may become increasingly questionable whether a return to the parent would be in the child's best interest.

Finally, the difficulty inherent in making the contrary-to-the-welfare determination required by section 472(a)(1) long after the child has been physically removed from home argues for reading this section as requiring a judicial determination which is reasonably contemporaneous with the child's physical removal. Under New York's position, the judicial proceedings leading to the contrary-to-the-welfare determination could be initiated several years after the child had been physically removed from the contrary-to-the-welfare home.

4. ACF's interpretation does not frustrate congressional intent to fund foster care placements with relatives.

New York nevertheless argued that ACF's interpretation frustrates congressional intent to provide funding for foster care placements with relatives because its effect is to substantially reduce the amount of funds available for such placements. (New York asserted and ACF did not dispute that Congress had a clear preference for such placements when the child had to be removed from a parent's home.) According to New York, states would be faced with the choice of foregoing IV-E funding if they placed the child with the relative with whom the child had been living for more than six months, or moving the child to another placement and then possibly back to the relative in order the make the child eligible for IV-E funding.[9]

However, as noted above, a state can ensure that it receives title IV-E funds for relative placements by simply initiating court proceedings leading to the contrary-to-the-welfare determination within six months of the time the child is physically removed from the home of his or her parent.[10] In any event, a child who is ineligible for IV-

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[9] We note that it is unclear whether the state agency can establish IV-E eligibility by simply removing the child from the home of the relative in which the child has resided for more than six months following the child's physical removal from home; a court would have to determine that continuation in that home was contrary to the child's welfare or there would have to be a voluntary placement agreement.

[10] This assumes that the state agency would be in a position to know that the child had been physically removed from home and was living with a relative. New York alleged that it could

E funds may still be eligible for AFDC payments under title IV-A. The basic AFDC program contemplates that a child might live in the home of a wide range of specified relatives (other than a parent) without necessarily becoming eligible for foster care benefits under title IV-E. Thus, ACF's policy does not frustrate any congressional intent to provide funding for children placed with relatives.

5. ACF's six-month grace period is neither inconsistent with PIQ-87-04 nor arbitrary.

ACF considered sample cases in which a child had been living with a parent (or other specified relative other than the relative with whom the children was ultimately placed) up to six months prior to the initiation of court proceedings as complying with section 472(a)(1). This was consistent with ACF's general recognition of a six-month grace period in the 1985 and 1991 versions of its "Financial Review Guide for On-Site Reviews of the Title IV-E Foster Care Program" and in ACYF-PIQ-89-01. As noted by New York, ACF has applied this six-month

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take "days, weeks, months, or even longer" before the state agency learned of this situation. New York City brief at 17. However, if, as is likely, the child's parent was receiving AFDC payments for the child, the child's removal should have been reported to the state agency. Moreover, if the child's relative applied for AFDC or foster care payments once the child began living with him or her, the state agency might have ascertained that the child had been recently removed from home. Finally, whenever a parent transfers a child to a relative's home under circumstances which the court later finds to be contrary to the child's welfare, such a transfer would likely come to the attention of the state agency through other means (e.g., through the filing of an abuse or neglect report by the relative).

grace period in another context in addition to the circumstances raised here, i.e., where the state agency takes action to remove the child from home on an emergency basis before initiating the court proceedings leading to the contrary-to-the-welfare determination. However, New York argued that the application of this six-month grace period here was inconsistent with ACF's interpretation of the removal requirement in PIQ-87-04. New York argued further that the grace period was arbitrary in that it was limited to only six months.

We disagree on both counts. PIQ-87-04 focuses on the *type* of removal required by section 472(a)(1), concluding that the removal must be a physical removal. It does not specifically address the question of when that removal must occur. In any event, as long as the child is removed within six months prior to the initiation of court proceedings, the child still may be reasonably considered to have been physically removed from the home as a result of these proceedings because of the close proximity between the proceedings and the physical removal. Thus, the six-month grace period is not inconsistent with the PIQ.

Furthermore, as discussed previously, the six-month grace period is not arbitrary because it is consistent with section 472(a)(4)(B)(ii). However, even if there were no statutory basis for this grace period, we would conclude that it is reasonable. A limited exception to the physical removal requirement for children who have been *recently* physically removed from home is consistent with Congress' recognition, discussed above, that children might need to be physically removed from home on an emergency basis prior to a judicial determination. In addition, this limited exception does not significantly delay the

provision of services directed toward reunification which are available only after the children are brought into the foster care system. Moreover, a six-month limit is reasonable because it ensures that particular events relating to the child's treatment in the parent's home will have occurred in close proximity to the court proceedings and thus will be readily and timely assessed during those proceedings. In the sample cases in question here, the child had already been removed from the contrary-to-the-welfare home for a period of over six months to several years before the initiation of court proceedings and had been placed throughout that period in the home of another specified relative who ultimately became a foster care provider for the child. The distance in time between the physical removal and the court proceedings conceivably made it more difficult (and less meaningful) for the court to consider the basic question of whether the child's continuation in that prior home was contrary to the child's welfare.

6. New York's position that the transfer of responsibility for the child's care and placement to the state agency constitutes the "removal" within the meaning of section 472(a)(1) is an unreasonable construction of that section.

New York took the position that its interpretation of the requirement for removal in section 472(a)(1) as referring to the transfer of responsibility for the child's care and placement to the state agency is the only reasonable interpretation. New York argued that the judicial removal of legal custody, not physical removal, "constitutes the pivot upon which the entire foster care placement process

revolves." New York brief at 14. *See also* New York City brief at 5. According to New York, moreover, both the Supreme Court and the Courts of Appeals have recognized this since they refer to the child's placement in the legal custody of the state agency as the beginning of foster care, and not to the child's physical removal. New York City brief at 7-8, citing *Suter v. Artist M.*, ___ U.S. ___, 112 S.Ct. 1360 (1992); *Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502 (1982); *Lipscomb by DeFehr v. Simmons*, 962 F.2d 1374 (9th Cir. 1992); *L.J. by Darr v. Massina*, 838 F.2d 118 (4th Cir. 1988), *cert. denied*, 488 U.S. 1018 (1989).

New York's argument is an unreasonable construction of the statute, however. Section 472 specifically requires *both* that the child be removed from home and that the state agency have responsibility for the child's care and placement. If the requirement for removal from home in section 472(a)(1) is read to mean just the transfer of responsibility for the child to the state agency, as argued by New York, then section 472(a)(2), which requires that the child's placement and care be the responsibility of the state agency, becomes superfluous. Thus, Congress clearly intended the two provisions (sections 472(a)(1) and (2)) as separate conditions of IV-E eligibility. This construction does not deny that the transfer of responsibility for the child's care and placement is a critical step in qualifying the child for IV-E services, but merely recognizes that it is not the only step. Moreover, as we discussed at length in section 1, New York's interpretation is unreasonable because it fails to adhere to the requirement for a physical removal within the time frame that is explicitly contemplated by provisions of section 472(a) of

the Act. Finally, none of the cases cited by New York support its interpretation. The mere fact that the courts recognized that children in foster care were in the custody of the state does not mean that the courts viewed the transfer of responsibility for a child's care and placement to the state agency as equivalent to removal from the home.

7. The language of the IV-E regulations concerning "removal" is not inconsistent with ACF's interpretation.

New York contended that certain provisions of the IV-E regulations adopted in 1993 were inconsistent with ACF's interpretation. The regulations in question implement the statutory requirements for a system for the collection of adoption and foster care data. 58 Fed. Reg. 67924 (December 22, 1993), to be codified at 45 C.F.R. Part 1355. These regulations were not designed to implement the statutory requirement for removal and were not in effect during the time period covered by the disallowances here. Thus, New York cannot reasonably rely on them.

In any event, one provision of the regulations cited by New York clearly supports ACF's interpretation, and the other provision is not inconsistent with that interpretation. New York relied on the absence of any reference to physical removal in a provision defining "foster care" as "24 hour substitute care for all children placed away from their parents or guardians and for whom the State agency has placement and care responsibility. . . . " In fact, however, this provision supports ACF's interpretation. The phrase "placed away, like the term "removed,"

appears to contemplate a physical removal rather than a change in legal status. Moreover, the regulatory definition of "foster care" views the placing away, or removal, of the child as *separate* from the state agency's responsibility for the child's placement and care and is thus inconsistent with New York's view that the act of giving the state agency such responsibility constitutes "removal" within the meaning of section 472(a).

New York also disputed ACF's contention that a provision requiring that states document the number of "removal episodes" which defines that term as "removal of the child from his/her normal place of residence resulting in his/her placement in a foster care setting" supported ACF's interpretation. New York contended that the child's "normal place of residence" means a place other than the child's *actual* residence, so that a child could be constructively removed from the parent's home by a court order even if the child was no longer actually residing in that home. However, New York would read more into this language than the plain meaning would require. In the context of these regulations, "normal place of residence" could just as easily mean the home the child resided in prior to placement in foster care.

8. ACF's interpretation was not a legislative rule which was required to be published pursuant to notice and comment rulemaking, but was instead an interpretative rule of which New York had actual notice.

The Administrative Procedure Act requires publication of a proposed legislative rule followed by an opportunity

for public comment in order for such a rule to be enforceable. 5 U.S.C. § 553(b), (c). An interpretative rule is not subject to the notice and comment requirement, although a party cannot be adversely affected by such a rule unless timely, actual notice of the rule has been given or the rule has been published in the *Federal Register*. 5 U.S.C. § 552(a)(1).

New York argued that ACF's reading of section 472(a)(1) as requiring physical removal was not an interpretative rule but was instead a legislative rule. New York asserted that ACF did not merely interpret or clarify the Act, but rather added substance to the Act. According to New York, ACF "has, in effect, amended the statute by constructively inserting the word 'physical' into section 472(a) of the Act." New York brief at 18. In addition, New York asserted that any rule that affects a grantee's ability to claim federal funds, as this does, is a legislative rule. New York also noted that exceptions to the notice and comment requirements are to be narrowly construed. Finally, New York contended that, even if ACF's reading constituted an interpretative rule, it was not binding because it was inconsistent with ACF's six-month grace period and the states therefore lacked actual notice of "which removal requirement" was applicable. *Id.* at 20.

As discussed above, however, ACF's interpretation has such compelling support within the framework of section 472(a) as a whole that it appears to be the *only* reasonable interpretation of "removal." Thus, ACF here was merely applying the requirements of the statute, of which New York had notice.

Even if section 472(a) were subject to more than one reasonable interpretation, however, ACF's interpretation of the term "removal" in section 472(a) would not be a legislative rule. Legislative rules create law or obligations, while interpretative rules are statements of what an administrative agency thinks a statute or regulation means. *Cabais v. Egger*, 690 F. 2d 234 (D.C. Cir. 1982). PIQ-87-04, applied in conjunction with the six-month grace period recognized in other ACF issuances, is clearly a statement of what ACF thinks the term "removal" means.

Moreover, under prevailing case law, even if a rule has a significant impact on a party, this alone does not require that it be treated as a legislative rule. *See New York State Dept. of Social Services*, DAB No. 1473 (1994) at 8 and court cases cited therein. Accordingly, even if the effect of ACF's reading was to limit title IV-E funding for children placed with relatives (which we found above was not necessarily the case), that would not make it a legislative rule.

Furthermore, although the distinction between a legislative and an interpretative rule can sometimes be blurred, this case involves a clear-cut interpretative rule. Thus, there is no basis for New York's argument that this case involves an interpretative rule only under a broad construction of this exception to the notice and comment requirement.

We also reject New York's argument that it did not have actual notice of ACF's interpretation. Section 472(a)(4)(B)(ii) provides the authority for the six-month grace period ACF applied in this case. Moreover, ACF

provided notice of this grace period in its Financial Review Guide and PIQ-89-01. As discussed earlier, PIQ-87-04 was not inconsistent with this six-month grace period. It focused on the requirement for physical removal and nowhere stated when a qualifying removal had to occur in relation to the initiation of judicial proceedings. Furthermore, New York cannot reasonably argue that it was prejudiced by ACF's application of PIQ-87-04 here since ACF gave New York the benefit of the six-month grace period. Accordingly, New York's argument that it did not know "which rule" applied has no merit.

We therefore conclude that PIQ-87-04, as applied in this case, constituted an interpretative rule of which New York had actual notice, and was binding on New York since ACF's interpretation was highly reasonable.

9. It was not improper for ACF to disallow some claims without first deferring or auditing them.

Most of the claims in question here were initially deferred. A portion of the deferred claims was subsequently disallowed based on the results of a review of sample cases. However, claims totalling $34,414,224 in federal funding were fully paid upon submission, and later disallowed based on the case sample review. ACF recouped the disallowed amount by reducing the payments made for that portion of the previously deferred claims which ACF determined was allowable.

New York argued that ACF lacked authority to retroactively disallow claims that it had previously allowed and

paid. According to New York, ACF could properly disallow claims only as a result of the claims review (deferral) process set out in 45 C.F.R. § 201.15(c) or based on an audit or other review.[11] New York contended that –

> the audit and deferral processes afford grantees the opportunity to demonstrate the allowability of their claims and thereby avoid the issuance of unwarranted disallowances. A general rule authorizing the disallowance of claims which have not been audited or deferred would eliminate this opportunity and require the Board to decide many cases which could be resolved without its intervention.

New York reply brief at 23; *see also* New York City reply brief at 21.

We find no merit in New York's argument. New York did not point to any authority which specifically requires that any disallowance be taken pursuant to either the section

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[11] Section 201.15 provides that a claim or portion of a claim may be deferred (as opposed to paid or disallowed) when the Regional Administrator believes the claim or a specific portion of the claim is of questionable allowability. The Regional Administrator must give the state written notice of the deferral which specifies the reason for the deferral and requests the state to make available for inspection all documents and materials which the Regional Office believes necessary to determine the allowability of the claim. The Regional Administrator (or Administrator) has 90 days after all documentation is available in readily reviewable form to determine the allowability of the deferred claim (and may disallow if documentation is not submitted in readily reviewable form within the specified time). The claim must be paid subject to a later determination of allowability if the Regional Administrator is unable to complete the review within that time period.

201.15 deferral process or an audit. Section 474(d)(2) of the Act and the implementing regulations provide simply that adjustments to quarterly amounts paid to states can be made for prior overpayments which the Secretary determines were made, including overpayments based on estimates for prior quarters.

In any event, the rationale on which New York relied is inapposite here since New York in fact had an opportunity to demonstrate the allowability of the claims in question. ACF disallowed these claims based on the same case sample review which was proposed and conducted by New York in order to determine the allowability of the deferred funds. New York did not dispute that it had an adequate opportunity, through the case sample review, to demonstrate the allowability of the deferred claims before they were disallowed in part. New York apparently takes the position that this sample could not properly be applied to cases outside the universe from which the sample was drawn. However, this is a statistical sampling issue and does not affect the validity of the procedure whereby the claims were disallowed.[12]

Conclusion

For the foregoing reasons, we conclude that ACF properly found ineligible for IV-E funding children who were not physically removed from home within six months prior to the initiation of court proceedings resulting in a

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[12] Indeed, New York specifically identified this as one of the calculation issues which it agreed should be addressed after the Board ruled on the other issues presented by these appeals.

judicial determination that continuation in the home was contrary to the child's welfare. Accordingly, we uphold the disallowances in principle. The Board will schedule further proceedings to consider New York's arguments concerning the calculation of the disallowances if New York so requests within 30 days of its receipt of this decision.

/s/ Judith A. Ballard
Judith A. Ballard

/s/ Cecilia Sparks Ford
Cecilia Sparks Ford

/s/ Donald F. Garrett
Donald F. Garrett
Presiding Board Member

APPENDIX I

California Department of Social Services
Administrative Division

Estimates Branch
FC Program

Foster Care Expenditures
Federal Foster Care Program

	Total	*Federal*	*State*	*County*
July-95	$55,466,110	$25,540,261	$11,970,339	$17,955,510
August-95	$58,018,839	$26,823,343	$12,478,198	$18,717,299
September-95	$56,819,570	$26,187,029	$12,253,016	$18,379,524
October-95	$57,230,273	$26,368,366	$12,344,764	$18,517,143
November-95	$57,886,723	$26,785,911	$12,430,167	$18,670,646
December-95	$58,125,354	$26,741,686	$12,553,467	$18,630,201
January-96	$58,634,599	$27,024,390	$12,644,084	$18,966,126
February-96	$58,006,268	$26,683,860	$12,528,963	$18,793,445
March-96	$59,204,311	$27,486,927	$12,686,994	$19,030,390
April-96	$61,004,967	$28,427,705	$13,030,904	$19,546,357
May-96	$61,455,804	$28,303,742	$13,260,825	$19,891,238
June-96	$61,823,412	$28,500,873	$13,329,016	$19,993,523
Fiscal Year 1995-96	$703,676,233	$324,874,093	$151,510,738	$227,291,402

(2)

No. 97-727

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NOV 26 1997
CLERK

In The

Supreme Court of the United States

October Term, 1997

ELOISE ANDERSON, as Director of the California Department of Social Services, and the CALIFORNIA DEPARTMENT OF SOCIAL SERVICES,

Petitioners,

vs.

CAPITOLA LAND, MARIA LOPEZ and JEAN McCRUMBY,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal Of California, Second Appellate District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BARBARA A. JONES
Counsel of Record
TROY B. SMITH
Legal Aid Foundation of Los Angeles
1102 Crenshaw Boulevard
Los Angeles, California 90019-3111
Telephone: (213) 964-7900, Ext. 2110

MARJORIE SHELVY
Legal Aid Foundation of Los Angeles
5228 East Whittier Boulevard
Los Angeles, California 90022
Telephone: (213) 266-6451, Ext. 510

Attorneys for Respondents Capitola Land, Maria Lopez and Jean McCrumby

November 26, 1997

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

DOES CALIFORNIA'S REGULATION DENYING FOSTER CARE BENEFITS TO OTHERWISE ELIGIBLE FOSTER CHILDREN SOLELY BECAUSE THEY WERE ABANDONED BY THEIR PARENTS MORE THAN SIX MONTHS PRIOR TO THE TIME THE STATE FILED A JUVENILE PETITION REMOVING THEM FROM THEIR PARENT'S CUSTODY VIOLATE THE SOCIAL SECURITY ACT?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

RELEVANT STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

REASONS WHY THE PETITION SHOULD BE DENIED 9

I. CERTIORARI IS PREMATURE SINCE THERE ARE NO STATE OR FEDERAL COURT DECISIONS CONTRARY TO THE COURT OF APPEAL DECISION IN THIS CASE 9

II. THE DEPARTMENT OF HEALTH AND HUMAN SERVICES RECENT INCONSISTENT ADMINISTRATIVE DECISION ON THE ISSUE OF FOSTER CARE LINKAGE IS NOT A REASON TO GRANT CERTIORARI WHEN NO FEDERAL OR STATE COURT SUPPORTS THAT DECISION 11

III. CERTIORARI SHOULD BE DENIED BECAUSE THE COURT OF APPEAL'S DECISION IS LEGALLY CORRECT AND SUPPORTED BY A PLAIN READING OF THE FEDERAL STATUTE 15

IV. THE LEGISLATIVE HISTORY REFLECTS AN INTENT TO EXPAND FOSTER CARE ELIGIBILITY 18

V. THE STATE OF CALIFORNIA'S ASSERTION THAT THE CALIFORNIA COURT OF APPEAL'S DECISION IMPOSES A POTENTIALLY DEVASTATING FISCAL IMPACT IS TOTALLY UNSUBSTANTIATED AND WITHOUT ANY BASIS 22

TABLE OF CONTENTS – Continued

Page

CONCLUSION 24

APPENDIX A (Former 42 U.S.C. § 672(a); Act of Dec. 22, 1987, Pub.L.No. 100-203, Tit. XI, §§ 9133(b)(2), 9139(a), 101 Stat. 1330-314, 1330-321) A-1

APPENDIX B (Former 42 U.S.C. § 606(a); Act of Aug. 16, 1984, Pub.L.No. 98-378, § 20(a), 98 Stat. 1322) B-1

APPENDIX C (Former 42 U.S.C. § 607(a); Act of Nov. 5, 1990, Pub.L.No. 101-503, Tit. V §§ 5061(a), 5082(a), 104 Stat. 1388-231, 1388-232) ... C-1

APPENDIX D (Manual of Policies and Procedures § 45-302.313) D-1

APPENDIX E (Proposed Decision of Administrative Law Judge Quintanilla) E-1

APPENDIX F (Department of Social Services, All County Letter (ACL) No. 92-33 (March 26, 1972) ... F-1

APPENDIX G (Correspondence dated June 7, 1991 from Barbara G. Elbrecht, Staff Attorney, California Department of Social Services to Alice Bussiere, Staff Attorney National Center for Youth Law) G-1

TABLE OF AUTHORITIES

Page

CASES

Batterton v. Francis, 432 U.S. 416 (1977) 13

California v. Taylor, 353 U.S. 553 (1957) 24

Chevron U.S.A. v. Nat. Resources Def. Council, Inc., 467 U.S. 837 (1984) 12, 13, 14

Doe v. Reivitz, 830 F.2d 1441 (7th Cir. 1987) 14

Fabula v. Buck, 598 F.2d 869 (4th Cir. 1979) 12

INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) 12

King v. Smith, 392 U.S. 309 (1968) 11

Land v. Anderson, 55 Cal.App.4th 69 (1997) 2, 4, 10, 22, 23, 24

Miller v. Youakim, 440 U.S. 125 (1979) 5, 6, 16

Pennington v. Didrickson, 22 F.3d 1376 (7th Cir. 1994) 13, 14

Tovar v. U.S. Postal Service, 3 F.3d 1271 (9th Cir. 1993) 14

Townsend v. Swank, 404 U.S. 282 (1971) 11

STATUTES

FEDERAL STATUTES

42 U.S.C. § 602(a)(20) 4

former 42 U.S.C. § 606(a) 1

former 42 U.S.C. § 607(a) 1

42 U.S.C. § 670, *et seq* 4

42 U.S.C. § 672 ..... 8, 17, 24

TABLE OF AUTHORITIES

Page

former 42 U.S.C. § 672(a) 1, 6, 15

former 42 U.S.C. § 672(a)(4) 3, 14, 15, 17, 18

Responsibility and Work Reconciliation Act of 1996; 1997 Balanced Budget Act Pub.L.No. 105-33, § 5513(b), 111 Stat 251 (Aug. 5, 1997)..... 2

STATE REGULATIONS

Manual Policy and Procedure § 45-202.313 17

LEGISLATIVE REPORTS AND HEARINGS

H. R. Rep. No. 544, 90th Cong., 1st Sess. (1967)..19, 20

S. Rep. No. 744, 90th Cong., 1st Sess. (1967) 19, 20

MISCELLANEOUS

Department of Social Services, All County Letter (ACL) No. 92-33..... 11

Romo, Reforms Push Adoption Over Reunification, Los Angeles Daily Journal, July 3, 1997, at 1, Col. 1 23

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondents, Capitola Land, Maria Lopez and Jean McCrumby, respectfully request that this Court deny the petition for writ of certiorari ("Pet."), seeking review of the unanimous California Court of Appeal opinion, 55 Cal.App.4th 69 (1997) on the ground that the Court's interpretation of the Social Security Act is manifestly correct in light of the plain meaning of the federal statute. There are additionally no federal or state court decisions which reach a contrary result and one recent inconsistent administrative decision should not be a reason to grant certiorari.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions[1] are former 42 U.S.C. § 672(a);[2] former 42 U.S.C. § 606(a);[3] and former 42 U.S.C. § 607(a).[4] All references in this opposition are to these former statutes which were interpreted by the Court of Appeal. The petitioners cite to the revisions to

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[1] The respondents' Appendix (hereinafter "App.") sets forth the statutes involved in this case and also includes other material respondents believe essential to understand the Brief in Opposition. The petitioners' Appendix will be distinguished and referred to throughout as "Pet. App."

[2] Act of Dec. 22, 1987, Pub.L.No. 100-203, tit. XI §§ 9133(b)(2), 9139(a), 101 Stat. 1330-314, 1330-321.

[3] Act of Aug. 16, 1984, Pub.L.No. 98-378, § 20(a), 98 Stat. 1322.

[4] Act of Nov. 5, 1990, Pub.L.No. 101-508, tit. V §§ 5061(a), 5062(a), 104 Stat. 1388-231, 1388-232.

these statutes added pursuant to § 108 of the Responsibility and Work Reconciliation Act of 1996 and the 1997 Balanced Budget Act.[5] The Court of Appeal, however, specifically stated that their decision was limited to the former statutes in effect at the time of the lower court decisions. *Land v. Anderson*, 55 Cal.App.4th 69.[6] Accordingly, the relevant statutory provisions are those in effect at the time of the Court of Appeal's decision (May 20, 1997) and all citations in this brief are to the relevant statutory authority in effect at the time of the lower court decisions.

STATEMENT OF THE CASE

The principal issue in the three consolidated cases before the Court is whether five (5) abused, neglected and abandoned children qualify for federal foster care benefits. The facts are not in dispute. The children were denied federal foster care benefits because of a state regulation enacted by the California Department of Social Services (DSS) which conflicts with federal law. The DSS regulation at issue (App. D-1) denies federal foster care to any child who has not resided with the parent from

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[5] Pub.L.No. 105-33, § 5513(b), 111 Stat. 251) (Aug. 5, 1997).

[6] The Court of Appeal noted that the AFDC program was amended by the Welfare Reform Act of 1996 and that the provisions of that Act became effective on July 1, 1997. The Court of Appeal specifically stated that "We are not here concerned with these changes wrought by the act, and express no opinion concerning their impact on the federal foster care program." Pet. App. 7, fn 1.

whom removed within six months of the date the county filed the removal petition. The children seek foster care benefits because the cash grant is somewhat higher than AFDC, and because the program provides additional services to meet the special needs of foster children that result from their abusive home environments. Since the respondent children were born to drug-addicted mothers and all were abused, their health care and other needs exceed the needs of normal healthy children. The petitioners ask this Court to ignore the critical word "or" in the federal foster care statute, former 42 U.S.C. § 672(a)(4), and to reverse a unanimous California appellate decision which affirmed three different trial court decisions granting the children federal foster care benefits. To interpret 42 U.S.C. § 672(a)(4) as petitioners desire, contrary to a plain reading of the statute, would require this Court to rewrite the federal statute and, at least, to delete the critical word "or" in each section of 42 U.S.C. § 672(a)(4).

The petitioners' position is legally erroneous and does not comport with a plain reading of 42 U.S.C. § 672 (a)(4). The children meet all the eligibility requirements of the federal law and are entitled to federal foster care benefits. All the decisions – by the California Court of Appeal, two different superior court judges and by one of

the petitioners' own administrative law judges[7] – determining all the children eligible for federal foster care benefits should be upheld.

1. THE AFDC-FOSTER CARE PROGRAM

The Aid to Families with Dependent Children – Foster Care ("AFDC-Foster Care" or "Foster Care") Program, Social Security Act, Section 408, 42 U.S.C. § 670, *et seq*, is one of the federal state cooperative public assistance programs under the Social Security Act of 1935, as amended (the "Act"). In 1961, when the Foster Care Program was enacted, participation was optional for states participating in the basic Aid to Families with Dependent Children ("AFDC") Program. Since July 1, 1969, states participating in the basic AFDC program must also have a Foster Care Program. 42 U.S.C. § 602(a)(20).

The Foster Care Program provides cash payments and specialized social services including additional health services available to eligible foster children. Foster children receive higher money benefits than children receive under the basic AFDC program. Moreover, the states must provide specialized intensive services to AFDC – Foster Care children, including Family Reunification services, and must assure that the foster homes in which these children live meet state qualitative licensing

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[7] The Administrative Law Judge in the *Land* case also concluded that the *Land* child qualifies for federal foster care benefits. The petitioner unilaterally rejected his decision which required the respondents to seek judicial relief. A copy of Administrative Law Judge Quintanilla's proposed decision is attached as Appendix E.

standards for suitable foster placements. Foster children also receive a small annual clothing allowance when they start school. Children in the basic AFDC program are ineligible for these special services, and their homes need not meet such standards. This Court has noted that:

> Congress attached considerable significance to the unique needs and special problems of abused children who are removed from their homes by court order, distinguishing them as a class from other dependent children:
>
> > "The conditions which make it necessary to remove [neglected] children from unsuitable homes often result in needs for special psychiatric and medical care of the children. . . .
> >
> > . . . .
> >
> > "These are the most underprivileged children and often have special problems . . . " (108 Cong.Rec. 12692-12693 (1962) remarks of Sen. Eugene McCarthy.)
>
> *Miller v. Youakim*, 440 U.S. 125, 141 (1979)

The eligibility criteria for the federal foster care program are straightforward. First, the child must have been removed from the home of a parent (or other relative) as the result of a judicial determination to the effect that continuation in the home would be contrary to the welfare of such child. Second, the State must remain responsible for the placement and care of the child. Third, the child must be placed in "a foster family home or child-care institution." Fourth, at the time the child's removal petition is initiated, the child must be eligible for categorical assistance under the State's plan. *Miller*, 134-135.

There is no dispute that the first three requirements of § 672(a) were met. (Pet. App. 9)

Congress designed the entire statutory scheme to provide the broadest possible inclusion of abused, abandoned and neglected children and a plain reading of the federal statute makes clear that these children qualify for federal foster care benefits.

2. FACTUAL BACKGROUND

There are five (5) children at issue in case. Two (2) live with grandmothers, two (2) with an aunt and one (1) child, George, has since been placed in an unrelated foster home.[8] All the children were removed from abusive and drug-addicted mothers. All of the children have serious physical and mental problems as a result of the abuse they suffered with their mothers. Four of the children continue to reside with related indigent foster parents who do not have the financial resources to meet these children's medical or subsistence needs. The children have sought foster care benefits because AFDC benefits are insufficient to meet their special needs. The sole reason the children were denied foster care benefits is because the children were abandoned by their parents

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[8] The child who resides with unrelated foster parents is now paid foster care benefits by California. This case would only affect his right to retroactive benefits. The four other children still do not receive foster care benefits since they still reside with related foster parents. The fact that these children reside with related foster parents should not be the reason that these children are denied foster care. *Miller v. Youakim*, 440 U.S. 125, 145 (1979).

more than six months prior to the time that a juvenile petition was filed removing them from their parent's custody.

As the specific facts demonstrate, the children might have even met the additional unlawful requirement in petitioners' regulation but for delays by the Department of Children and Family Services (DCFS) in taking the actions required by state law.[9] For example, DCFS delayed and did not file the removal petitions promptly. *See, e.g.*, Superior Court Wayne's Statement of Decision in *McCrumby v. Anderson*, Pet. App. 57. This action is entirely under the county's control and, unfortunately, the county is not penalized for failure to comply. Thus, by the terms of the regulation at issue, if the State agent, i.e. the county, delays filing a removal petition for any reason until after the six month regulatory deadline, the child is thereby automatically disqualified under California's regulation from eligibility for federal foster care. In fact, the petitioners' regulations place all the required actions (removal of child, filing of court petition, preparing and submitting applications for foster care benefits) entirely under the control of the state agent, namely DCFS.

3. LOWER COURT DECISIONS

After a "careful review of the statutory provisions, the legislative history, the intent of Congress, and the purpose of the law" (Pet. App. 3) the Court of Appeal

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[9] DCFS is the designated agent of the petitioners for administration of the Foster Care program in Los Angeles County.

unanimously concurred with two separate trial courts that the five abused and abandoned children who are the subject of this action qualify for federal foster care benefits. The Court of Appeal in affirming the two separate trial courts concluded that the petitioners' reading of the federal statute at issue here "makes very little sense". In summarizing why the petitioners' arguments make no sense the Court of Appeal noted that:

> If the Department is to be believed, a child left in limbo for six months because the parent has abandoned him or her with someone who was not the official custodian or because the county failed to file a petition after removing the child from parental custody within six months, is a child forever disqualified. This makes very little sense. We can imagine no reason why Congress would establish a system where an abused and neglected child's need for foster care payments is measured by the actions or inactions of the parent from whom custody is being wrested, other adults who do not have legal custody, or the county's department of children's services. If Congress had intended to draw a distinction between needy children living with their parents and needy children abandoned by their parents and create a sort of statute of limitations within which the abandoned child's benefactors must act or forever lose the right to federal foster care benefits, surely it would have said so directly. (Pet. App. 20, 21)

The Congressional objective of ensuring that greater funds would be available to care for abused and neglected children is best achieved by construing 42 U.S.C. § 672 in accordance with its plain words rather

than by searching for the construction urged by the petitioners which is designed to exclude the very children Congress sought to protect.

REASONS WHY THE PETITION SHOULD BE DENIED

I

CERTIORARI IS PREMATURE SINCE THERE ARE NO STATE OR FEDERAL COURT DECISIONS CONTRARY TO THE COURT OF APPEAL DECISION IN THIS CASE

There are no federal or state court cases which reach a contrary result to that of the lower court's decision in this case. The fact that there is merely one recent administrative decision which reaches a contrary result should not be a reason to grant certiorari particularly when that decision is a recent one and where the agency's interpretation of the statute has been inconsistent.

The petitioners' statement that the Department of Health and Human Services "firmly supports" their position (Pet. 21) is simply not true. As recently as 1991 the federal position had changed due to a federal audit. See Correspondence to Alice Bussierre, attached hereto as Appendix G.

Likewise, the federal government's inconsistent support of the Departmental Appeals Board decision is buttressed by the fact that the federal government offered the State of New York a significant multi-million dollar settlement in exchange for the State of New York waiving its rights to seek judicial review of the decision.

In order for this Court to accept the petitioners' position it would have to rule that it is proper for state and federal courts to ignore the critical word "or" in federal statutes. That holding would wreak havoc in the interpretation of an untold number of federal statutes both related and unrelated to the federal foster care program.

No less than six state judges have rejected the same mischaracterizations and arguments the Director makes in the petition. *See* Pet. App. 1-23 (three judge panel decision unanimously affirming three separate trial court rulings); Pet. App. 49-51 (Los Angeles County Superior Court Statement of Decision in *Land v. Anderson*); Pet. App. 52-54 (Los Angeles County Superior Court Statement of Decision in *Lopez v. Anderson*); Pet. App. 55-59 (Los Angeles County Superior Court Statement of Decision in *McCrumby v. Anderson*). The petitioners' own Administrative Law Judge in the *Land v. Anderson* case likewise rejected the Director's arguments (Decision attached hereto as Appendix E.). Additionally, Justice O'Connor rejected the Department's arguments in their Stay Application, Order, No. A. 299 (U.S. Sup. Ct. 10/28/97).

The Department's position is legally erroneous and no reason exists to grant certiorari.

II

THE DEPARTMENT OF HEALTH AND HUMAN SERVICES RECENT INCONSISTENT ADMINISTRATIVE DECISION ON THE ISSUE OF FOSTER CARE LINKAGE IS NOT A REASON TO GRANT CERTIORARI WHEN NO FEDERAL OR STATE COURT SUPPORTS THAT DECISION

This Court has refused to give administrative rulings any weight when they are inconsistent with federal statutes. *Townsend v. Swank*, 404 U.S. 282, 286 (1971); *King v. Smith*, 392 U.S. 309, 333 (1968). The recent untitled administrative decision issued by the Department of Health and Human Services is contrary to the Social Security Act and should not be followed.

The California Court of Appeal noted that the circumstances under which deference typically takes place are absent from the record here. Both the federal administrative decision and California's regulation were enacted decades after the passage of the federal act and they are therefore not "contemporaneous" interpretations of the federal statute so they fail the "temporal" test. (Pet. App. 19)

The federal agency decision likewise " . . . gives no particular insight into the opinion of the entire agency, as it is not a formal regulation, adopted after notice and hearing." (Pet. App. 19)

The administrative decision also contradicts the petitioners' own prior interpretation of the statute. *See*, Department of Social Services, All County Letter (ACL) No. 92-33, attached hereto as Appendix F.

The petitioners' arguments that California's regulation was approved by the Department of Health and Human Services (Pet. 6-7) is likewise wrong. Approval of a State plan does not give explicit attention to each State regulation and is of little consequence. *Fabula v. Buck*, 598 F.2d 869, 873 n.11 (4th Cir. 1979).

In an effort to get this Court to grant certiorari and reject the lower court decisions, the petitioners argue that *Chevron U.S.A. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837, 844 (1984) mandates that deference should be given to the untitled "Board" decision attached to the Petition. Pet. 23. The petitioners' reliance on *Chevron*, however, is misplaced. *Chevron* is inapplicable since its principle of judicial deference applies only "if the statute is silent or ambiguous with respect to the specific issues." *Chevron*, 467 U.S. at 843. Otherwise, "[t]he judiciary is the final authority on issues of statutory construction" and the courts must reject administrative constructions which are contrary to clear Congressional intent. 467 U.S. at 843, n.9. *See also, INS v. Cardoza-Fonseca*, 480 U.S. 421, 445, n.29 (1987).

This Court exhaustively explored the issue of deference to federal agency statements in *Chevron, supra* at 837. Five important factors distinguish this case from *Chevron*: (1) The agency position in *Chevron* was the result of a considered and public process and was embodied in a formal regulation, whereas in this case it is apparently an administrative decision;[10] (2) The regulation at issue in

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[10] The agency position here was not only *not* the result of a considered and public process, but the petitioners' position and

Chevron involved the interpretation of statutory language requiring specialized expertise clearly within the province of the agency, whereas this case deals with the question of whether a child met certain clear requirements; (3) The issue in *Chevron* was essentially a policy dispute more appropriate for resolution in the political branches, whereas the issue on this appeal is a purely legal one; (4) *Chevron* involved the interpretation of a statutory provision that, in light of both the language and the legislative history, was highly ambiguous, whereas in this case the language is clear; (5) the agency's position in this case has been inconsistent and both the petitioners and the federal agency have apparently changed their position on this issue. See Appendices F – G. It is questionable what deference, if any, a court should give to an inconsistent agency position. *See, e.g., Batterton v. Francis,* 432 U.S. 416, 425 at n.9 (1977). Consideration of these factors leads to the inevitable conclusion that the untitled administrative decision attached to the California's petition is entitled to no deference whatsoever.

The Seventh Circuit recently had the opportunity to review the scope of the *Chevron* doctrine as applied to HHS transmittals in *Pennington v. Didrickson,* 22 F.3d 1376 (7th Cir. 1994). In doing so, they:

> [D]istinguished between those statements of legislative intent that the agency embodies in

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the federal position have changed. Previously both the petitioner and apparently the local office of the federal agency supported the respondents' position as evidenced by the correspondence to Alice Bussiere, Staff Attorney to the National Center for Youth Law attached hereto as Exhibit G.

> formal regulations and that, consequently, have the benefit of *careful crafting and comment*, and those more informal statements that do not necessarily *reflect the deliberate focus of the entire agency on the issue of congressional intent. See, e.g. Doe v. Reivitz*, 830 F.2d 1441, 1446-47 (7th Cir. 1987) (stating that interpretative documents "are not entitled to the same degree of deference commanded by the high-powered regulations reviewed in *Chevron*"), (*amended*, 842 F.2d 194 (7th Cir. 1988). 22 F.3d at 1383 (footnote omitted) (emphasis added).

See also Tovar v. U.S. Postal Service, 3 F.3d 1271, 1277 (9th Cir. 1993) (declining to apply *Chevron* deference to a regulation adopted in a manner that did not allow for public comment).

Applying the *Pennington* rationale to this case it is clear that the "Board" decision submitted by the petitioners does not "reflect the focus of the entire agency" when the only voice involved was a section of the Department that did not have the benefit of formal rule making procedures.

Finally, *Chevron* is inapplicable since its principle of judicial deference applies only "if the statute is silent or ambiguous with respect to the specific issue." *Chevron*, 467 U.S. at 843. In this instance, Congress has addressed the issue unequivocally and has provided three separate ways for abandoned children to meet the AFDC linkage requirements to obtain federal foster care benefits. 42 U.S.C. § 672(a)(4).

III

CERTIORARI SHOULD BE DENIED BECAUSE THE COURT OF APPEAL'S DECISION IS LEGALLY CORRECT AND SUPPORTED BY A PLAIN READING OF THE FEDERAL STATUTE

This case presents a straightforward interpretation of a federal statute that provides foster care benefits for children. While important to the children involved, the issue affects a relatively small number of children in very specific circumstances – those children, AFDC recipients who reside with related foster care parents – who were abandoned by their parents more than six months prior to the filing of a juvenile petition removing them from their parent's custody. The petitioners argue that the state regulation is consistent with federal law, yet, there is no federal or state court decision which supports their position. The petitioners further complain that the Court of Appeal focused on the language set forth in 42 U.S.C. § 672(a)(4) to the exclusion of § 672(a). On the other hand, the petitioners focus solely on § 672(a), separating it from the statutory context. The Court of Appeal did not "ignore" the remainder of the federal foster care statutory scheme, as the petitioners state, but examined it in context.

Congress designed the entire statutory scheme to provide the broadest possible inclusion of abused, abandoned and neglected children. Particular attention was given to children who did not live with relatives in the petition month, or within the prior six months, and whose only possible linkage to AFDC was with their parents. In fact, children placed with non-related foster parents routinely receive federal foster care.

It is noteworthy that the petitioners previously conceded to the California Supreme Court that they would not dispute these children's eligibility for foster care if they were living with non-relatives. "Appellants do not dispute that a child may be eligible to receive AFDC-FC benefits while living with a non-relative in foster care or where the child is placed in foster care prior to the court's granting of the removal petition." (Pet. App. 45.) The fact that a child lives with a foster parent who is a relative should not be the reason the State denies the child federal foster care benefits. *Miller v. Youakim*, 440 U.S. 125, 134-135 (1979). "[F]ar from excluding related caretakers, the statute uses the broadest possible language when it refers to the homes of foster parents." *Miller* at 135. The petitioners argue that the dictum in *Miller* that a foster child must have been eligible for categorical assistance under the State's plan prior to the initiation of removal proceedings somehow supports their position. (Pet. 14) However, all of the children in this case were actually eligible and receiving categorical assistance (AFDC) prior to the initiation of the removal proceedings, so it is unclear how that dictum is at all relevant to this case. Contrary to the petitioners' arguments, *Miller v. Youakim* actually supports the children's position that they are entitled to benefits.

These children were all removed pursuant to a juvenile court order after a judicial determination was made that continuation in the home would be contrary to their welfare. The State remains responsible for the children's placement, and the children were placed in a "foster family home." Although the petitioners dispute whether

the children were sufficiently linked to the AFDC program, 42 U.S.C. § 672(a)(4) makes clear that a child is linked to AFDC if the child *either*:

> (a) received aid (AFDC) in or for the month that a voluntary placement agreement was entered into or a judicial petition was filed, *or*
>
> (b) would have received such aid in or for that month if an application for aid had been made, *or*
>
> (c) the child was living with a specified relative within six months prior to the month the petition was filed or a voluntary placement agreement was entered into, and could have received aid with that relative.

Here, the children met the federal linkage requirements since they not only received AFDC in the month in which California's agent, the Department of Children and Family Services (DCFS) filed the petitions on their behalf, but they were also receiving AFDC prior to that month. Although the children qualify for federal foster care benefits under 42 U.S.C. § 672, the petitioners denied them federal foster care benefits, citing their own regulation, Manual of Policies and Procedures (MPP) § 45-202.313. Attached hereto as App. D. MPP § 45-202.313 violates federal law since it creates additional eligibility requirements which are more restrictive than the requirements of the federal statute, 42 U.S.C. § 672.

Specifically, MPP § 45-202.313(a) requires that children must have lived with the parent or relative from whom they were removed within six months prior to the month that a juvenile petition is filed. See App. D.

As the court below reasoned, the State's theory "makes very little sense. We can imagine no reason why Congress would establish a system where an abused and neglected child's need for foster care payments is measured by the actions or inactions of the parent from whom custody is being wrested, other adults who do not have legal custody, or the county's department of children's services." (Pet. App. 20)

Where the words of a statute, given their ordinary meaning, are reasonably free from ambiguity, the Court should look no further to ascertain the statute's meaning.

The petitioners ask this Court to ignore or misconstrue the plain meaning of the statute, including the critical word "or" which precedes 42 U.S.C. § 672(a)(4). The Court of Appeal examined the statute in context, and determined that it is worded so as to provide federal foster care for the children at issue here. No reason exists for this Court's review.

IV

THE LEGISLATIVE HISTORY REFLECTS AN INTENT TO EXPAND FOSTER CARE ELIGIBILITY

Despite the petitioners' statements to the contrary, the legislative history fully supports the plain language of the statute. Congress recognized that not all children will still be with the abusive parent or guardian or receiving AFDC at the time the state agency files a court petition to legally remove them from that parent or guardian. The Social Security Act Amendments of 1961 and 1967 addressed these concerns.

The legislative history of the 1967 amendments contains repeated references to broadening eligibility for foster care, e.g. " . . . Federal funds will be available on a more liberal basis than for the basic [AFDC] program out of a recognition that foster family care is more costly than care in the child's home." H. R. Rep. No. 544, 90th Cong., 1st Sess., at 101 (1967) (Pet. App. 73); S. Rep. No. 744, 90th Cong., 1st Sess., at 164-165 (1967) (Pet. App. 88). Under the 1961 amendments, Federal funds were available for children in foster care only if the children were recipients of AFDC when they were removed from their home by a court order.

> Your committee is aware of the limitations on the provision described above for foster care through the AFDC program when children are removed from their home by court order. For the State to receive any Federal sharing, the children must be recipients of AFDC when the court issues its order. Your committee believes that this is an unduly limiting restriction and is proposing that this limitation be changed. H. R. Rep. No. 544, 90th Cong., 1st Sess., at 100-01 (1967) (Pet. App. 71).

Congress recognized the inequity of requiring that children actually be recipients of AFDC within six months of the petition of removal. This meant that children who did not live with any relative within six months of the petition month, and therefore were not eligible for AFDC in that time period, would never be eligible for Federal foster care.

In 1967 the statute was amended specifically to remedy this restriction, by including children who lived with

"a specified relative" within six months prior to the petition month and were eligible for AFDC with that relative, even if they did not actually receive AFDC benefits. Congress then set out the steps to achieve the desired result:

> Also included are children placed under court order who had been living with one of the specified relatives enumerated in the law within 6 months and would have been eligible upon application for AFDC if he were living with such relative and were removed from the home of such relative by order of the court. S. Rep. No. 744, 90th Cong., 1st Sess., at 164 (1967) (Pet. App. 87).

The petitioners misstate the legislative history, as well as the statute, by inserting words into both to reach a result neither expressed nor implied by Congress. In this effort, the petitioners misstate the 1961 statute, citing it as saying "only those children who actually lived in the home of removal at the time the petition was initiated were eligible for foster care benefits." Pet. 16. The words "lived in the home of removal" are not found in the cited legislative history. The actual words are: "if they were recipients of AFDC when they were removed from their home by a court," and "the children must be recipients of AFDC when the court issues its order." H. R. Rep. No. 544, 90th Cong., 1st Sess., at 100-01 (1967) (Pet. App. 71).

The Court of Appeal specifically rejected the petitioners' interpretation, stating:

> As with applicable language of § 672(a)(4)(A), the plain text of the 1961 version required only that the children be receiving AFDC benefits in the month in which the petition [for removal]

> was initiated and contained no express obligation that the children receive such benefits *while physically residing with the parent or guardian from whom they were removed.*" Pet. App. 15 (emphasis added).

The petitioners' claim that the Court of Appeal ignored the 1967 statute also falls short. The court addressed this, saying:

"In fact, the reports demonstrate that Congress was primarily focused on eliminating the distinctions between indigent children actually receiving AFDC benefits . . . [and] those entitled to such benefits but who had, for whatever reason, failed to obtain them." (Pet. App. 15)

The petitioners have gone to considerable lengths in an effort to insert restrictive language into the legislative history and the statute that Congress did not say and did not choose to add. On the contrary, the legislative history is replete with references to broadening and expanding Federal foster care coverage to provide for children who were eligible for but did not receive AFDC within the mandated time period, i.e., within six months of the filing of a removal petition. The petitioners are reading a discriminatory intent into a history which repeatedly references "broadening" by trying to exclude foster children receiving (or eligible for) AFDC with a non-parent relative. This reading would contradict congressional intent and actually penalize the children in the preferred placement. The legislative history fully supports the plain language of the statute and certiorari should be denied.

V.

THE STATE OF CALIFORNIA'S ASSERTION THAT THE CALIFORNIA COURT OF APPEAL'S DECISION IMPOSES A POTENTIALLY DEVASTATING FISCAL IMPACT IS TOTALLY UNSUBSTANTIATED AND WITHOUT ANY BASIS.

The petitioners' assertions regarding the fiscal impact of this case are pure hyperbole and totally unsubstantiated.

The petitioners mislead this Court by referencing the total costs to administer the entire foster care program in California which is alleged to cost approximately $703,676,233. (Pet. 24) The petitioners' reference to the costs of the federal foster care program has no application to this case and is irrelevant since the outcome of this case will not alter the cost of foster care for children currently receiving federal foster care. This case concerns a small group of children who do not currently receive foster care benefits. The costs to those children would be very minuscule compared to the State's cited costs to run the entire foster care program.

The State then refers to a total of 105,000 children alleged to be in foster care during the fiscal year 1995-1996, and that 18,200 of these children are currently receiving monthly AFDC/TANF benefits. Without referencing dollar amounts, the petitioners then make a vague assertion that a large number of the 18,200 children receiving monthly AFDC/TANF benefits would be eligible for the higher monthly AFDC-FC payments under the Court of Appeal's decision in *Land*. Significantly, the petitioners do not and cannot state how many of the 18,200 children would be eligible to receive federal foster care

benefits. Moreover, the petitioners cannot state with any reasonable certainty any significant amount of money involved in paying the respondents the increased federal foster care benefits.

A recent legal newspaper indicated that in Los Angeles County, 85 per cent of the children placed in foster care are returned home to their parents within six to 18 months after being placed in foster care.[11] This would indicate that the costs for the federal foster care program constantly fluctuate and that the costs for a typical child eligible for AFDC-FC would be very minimal because he or she does not remain in the program for any long period of time. Also, it is believed that a considerable number of the children receiving AFDC/TANF benefits were not placed with a relative pursuant to court order, as required by federal law, so they will not be impacted by the Court of Appeal's decision in *Land*.

The petitioners' argument is nothing more than an attempt to raise the specter that a large amount of money is at stake and that the State would be fiscally devastated. That assertion is completely erroneous. The fact is that the respondent children are precisely why the federal foster care program was developed and the fiscal impact of the Court of Appeal's decision would have on the AFDC-FC program in California cannot be demonstrated to be more than minimal.

The petitioners also failed to raise this issue before the trial court when the issues of eligibility were briefed

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[11] See, article by Cheryl Romo, Reforms Push Adoption Over Reunification, Los Angeles Daily Journal, July 3, 1997, p. 1.

and decided. It is axiomatic that issues or questions not raised or resolved in the lower court cannot be raised before the United States Supreme Court. *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957). For the first time, petitioners raised in the California Supreme Court the issue regarding the alleged enormous hardship to the state of California due to the costs of implementing the Court of Appeal's decision in *Land*. The petitioners asserted to the California Supreme Court that close to 20,000 children would be eligible for federal foster care benefits. The California Supreme Court denied certiorari. The petitioners now contend that less than 18,200 children would be affected by the decision. The petitioners predict without any bases that a significant number of the 18,200 would be impacted and only submits the irrelevant and misleading exhibit at Appendix I for the first time to demonstrate the costs of the entire federal foster care program in California. There will be no significant fiscal impact on the state or the counties if the Court of Appeal's decision is imposed and the request for certiorari should be denied.

CONCLUSION

The Court of Appeal conducted a thorough review of the legal issue presented and the legislative history of 42 U.S.C. § 672. The Court of Appeal's opinion is supported by a plain reading of the federal statute at issue and is legally correct. The petitioners have failed to meet the

requirements for certiorari by this Court and therefore certiorari should be denied.

Respectfully submitted,

BARBARA A. JONES
Counsel of Record
TROY B. SMITH
Legal Aid Foundation of Los Angeles
1102 Crenshaw Boulevard
Los Angeles, California 90019-3111
Telephone: (213) 964-7900, Ext. 2110

MARJORIE SHELVY
Legal Aid Foundation of Los Angeles
5228 East Whittier Boulevard
Los Angeles, California 90022
Telephone: (213) 266-6451, Ext. 510

Attorneys for Respondents

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TABLE OF CONTENTS

Page

APPENDICES

A. Former 42 U.S.C. § 672; Act of Dec. 22, 1987, Pub. L. No. 100-203, Tit. XI, §§ 9133(b)(2), 9139(a), 101 Stat. 1330-314, 1330-321 ..... A-1

B. Former 42 U.S.C. § 606(a); Act of Aug. 16, 1984, Pub. L. No. 98-378, Section 20(a), 98 Stat. 1322 ..... B-1

C. Former 42 U.S.C. § 607(a); Act of Nov. 5, 1990, Pub. L. No. 101-503, Tit. V §§ 5061(a), 5082(a), 104 Stat. 1388-231, 1388-232 ..... C-1

D. Manual of Policies and Procedures § 45-202.313 .. D-1

E. Proposed Decision of Administrative Law Judge Quintanilla E-1

F. Department of Social Services, All County Letter (ACL) No. 92-33, (March 26, 1992) F-1

G. Correspondence dated June 7, 1991 from Barbara G. Elbrecht, Staff Attorney, California Department of Social Services to Alice Bussiere, Staff Attorney National Center for Youth Law..... G-1

APPENDIX A

§ 672. Foster care maintenance payments program

(a) Qualifying children

Each State with a plan approved under this part shall make foster care maintenance payments (as defined in section 675(4) of this title) under this part with respect to a child who would meet the requirements of section 606(a) of this title or of section 607 of this title but for his removal from the home of a relative (specified in section 606(a) of this title), if –

(1) the removal from the home occurred pursuant to a voluntary placement agreement entered into by the child's parent or legal guardian, or was the result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child and (effective October 1, 1983) that reasonable efforts of the type described in section 671(a)(15) of this title have been made;

(2) such child's placement and care are the responsibility of (A) the State agency administering the State plan approved under section 671 of this title, or (B) any other public agency with whom the State agency administering or supervising the administration of the State plan approved under section 671 of this title has made an agreement which is still in effect;

(3) such child has been placed in a foster family home or child-care institution as a result of the voluntary placement agreement or judicial determination referred to in paragraph (1); and

(4) such child –

(A) received aid under the State plan approved under section 602 of this title in or for

the month in which such agreement was entered into or court proceedings leading to the removal of such child from the home were initiated, or

(B)(1) would have received such aid in or for such month if application had been made therefor, or (ii) had been living with a relative specified in section 606(a) of this title within six months prior to the month in which such agreement was entered into or such proceedings were initiated, and would have received such aid in or for such month if in such month he had been living with such a relative and application therefor had been made.

In any case where the child is an alien disqualified under section 1255a(h), 1160(f), or 1161(d)(7)[1] of Title 8 from receiving aid under the State plan approved under section 602 of this title in or for the month in which such agreement was entered into or court proceedings leading to the removal of the child from the home were instituted, such child shall be considered to satisfy the requirements of paragraph (4) (and the corresponding requirements of section 673(a)(2)(B) of this title), with respect to that month, if he or she would have satisfied such requirements but for such disqualification.

(b) Additional qualifications

Foster care maintenance payments may be made under this part only on behalf of a child described in subsection (a) of this section who is –

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[1] So in original. Probably should be "(d)(6)."

(1) in the foster family home of an individual, whether the payments therefor are made to such individual or to a public or nonprofit private child-placement or child-care agency, or

(2) in a child-care institution, whether the payments therefor are made to such institution or to a public or nonprofit private child-placement or child-care agency, which payments shall be limited so as to include in such payments only those items which are included in the term "foster care maintenance payments" (as defined in section 675(4) of this title).

(c) "Foster family home" and "child-care institution" defined

For the purposes of this part, (1) the term "foster family home" means a foster family home for children which is licensed by the State in which it is situated or has been approved, by the agency of such State having responsibility for licensing homes of this type, as meeting the standards established for such licensing; and (2) the term "child-care institution" means a nonprofit private child-care institution, or a public child-care institution which accommodates no more than twenty-five children, which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing or approval of institutions of this type, as meeting the standards established for such licensing, but the term shall not include detention facilities, forestry camps, training schools, or any other facility operated primarily for the detention of children who are determined to be delinquent.

(d) Children removed from their homes pursuant to voluntary placement agreements

Notwithstanding any other provision of this subchapter, Federal payments may be made under this part with respect to amounts expended by any State as foster care maintenance payments under this section, in the case of children removed from their homes pursuant to voluntary placement agreements as described in subsection (a) of this section, only if (at the time such amounts were expended) the State has fulfilled all of the requirements of section 627(b) of this title.

(e) Placements in best interest of child

No Federal payment may be made under this part with respect to amounts expended by any State as foster care maintenance payments under this section, in the case of any child who was removed from his or her home pursuant to a voluntary placement agreement as described in subsection (a) of this section and has remained in voluntary placement for a period in excess of 180 days, unless there has been a judicial determination by a court of competent jurisdiction (within the first 180 days of such placement) to the effect that such placement is in the best interests of the child.

(f) "Voluntary placement" and "voluntary placement agreement" defined

For the purposes of this part and part B of this subchapter, (1) the term "voluntary placement" means an

out-of-home placement of a minor, by or with participation of a State agency, after the parents or guardians of the minor have requested the assistance of the agency and signed a voluntary placement agreement; and (2) the term "voluntary placement agreement" means a written agreement, binding on the parties to the agreement, between the State agency, any other agency acting on its behalf, and the parents or guardians of a minor child which specifies, at a minimum, the legal status of the child and the rights and obligations of the parents or guardians, the child, and the agency while the child is in placement.

(g) Revocation of voluntary placement agreement

In any case where –

(1) the placement of a minor child in foster care occurred pursuant to a voluntary placement agreement entered into by the parents or guardians of such child as provided in subsection (a) of this section, and

(2) such parents or guardians request (in such manner and form as the Secretary may prescribe) that the child be returned to their home or to the home of a relative,

the voluntary placement agreement shall be deemed to be revoked unless the State agency opposes such request and obtains a judicial determination, by a court of competent jurisdiction, that the return of the child to such home would be contrary to the child's best interests.

(h) Aid to families with dependent children

For purposes of subchapters XIX and XX of the chapter, any child with respect to whom foster care maintenance payments are made under this section shall be deemed to be a dependent child as defined in section 606 of this title and shall be deemed to be a recipient of aid to families with dependent children under part A of this subchapter. For purposes of the preceding sentence, a child whose costs in a foster family home or child-care institution are covered by the foster care maintenance payments being made with respect to his or her minor parent, as provided in section 675(4)(B) of this title, shall be considered a child with respect to whom foster care maintenance payments are made under this section.

(Aug. 14, 1935, c. 531, Title IV, § 472, as added and amended June 17, 1980, Pub.L. 96-272, Title I, §§ 101(a)(1), 102(a)(1), (2), 94 Stat. 503, 513, 514; Nov. 6, 1986, Pub.L. 99-603, Title II, § 201(b)(2)(A), Title III, §§ 302(b)(2), 303(e)(2), 100 Stat. 3403, 3422, 3431; Dec. 22, 1987, Pub.L. 100-203, Title IX, §§ 9133(b)(2), 9139(a), 101 Stat. 1330-314, 1330-321.)

APPENDIX B

§ 606. Definitions

When used in this part –

(a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home (other than absence occasioned solely by reason of the performance of active duty in the uniformed services of the United States), or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) at the option of the State, under the age of nineteen and a full-time student in a secondary school (or in the equivalent level of vocational or technical training), if, before he attains age nineteen, he may reasonably be expected to complete the program of such secondary school (or such training);

APPENDIX C

§ 607. Dependent children of unemployed parents

(a) "Dependent child" defined

The term "dependent child" shall, notwithstanding section 606(a) of this title, include a needy child who meets the requirements of section 606(a)(2) of this title, who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of the parent who is the principal earner, and who is living with any of the relatives specified in section 606(a)(1) of this title in a place of residence maintained by one or more of such relatives as his (or their) own home.

* * *

45-202 FEDERAL AFDC-FC PROGRAM (Continued) 45-202

.212 A relative, other than the child's birth or adoptive parents, provided the child is otherwise federally eligible.

(a) The caretaker relative of such child shall have the option of selecting either AFDC-FC or the AFDC-FG/U Program.

(1) If AFDC-FC is selected, the case shall be treated in all respects as an AFDC-FC case.

(2) If AFDC-FG/U is selected, the case shall be treated in all respects as an AFDC-FG/U case.

D-1

.3 AFDC-FG/U Linkage Determination

.31 The child shall have been linked to the federal Aid to Families with Dependent Children - Family Group/Unemployed (AFDC-FG/U) Program during the month in which the petition was filed with the juvenile court, which led to the child's placement into foster care pursuant to a detention or dispositional order. This linkage requirement is met if one of the following conditions exists during the month in which the petition was filed:

.311 The child was living in the home of the parent or relative from whom removed, was eligible for, and received federal AFDC-FG/U.

.312 The child was living in the home of the parent or relative from whom removed and would have been eligible for federal AFDC-FG/U had application been made.

.313 The child was no longer living in the home of the parent or relative from whom removed, but would have been eligible for federal AFDC-FG/U based on that parent's or relative's home had he/she been living there and had application been made.

(a) To meet this condition, the child shall have been living with the parent or relative from whom removed, within any of the six months prior to the month in which the petition was filed with the juvenile court, which led to the child's placement into foster care pursuant to a detention or dispositional order.

45-202 FEDERAL AFDC-FC PROGRAM (Continued) 45-202

.32 Except as provided in .321 below, the determination that the child met the federal eligibility criteria of linkage to federal AFDC-FG/U specified in .31 above shall be a one-time determination. Therefore, subsequent changes in the child's placement or circumstances, except as specified in .321 below, shall not affect this initial linkage determination. However, if as a result of such change some other general or federal eligibility requirement is not met, FFP shall not be available until the child meets all other federal and general eligibility requirements.

D-2

APPENDIX E

If dissatisfied with this decision, please see last page for appeal rights.

CALIFORNIA DEPARTMENT OF SOCIAL SERVICES

In the Matter of the Hearing of Claimant CAPITOLA LAND 1572 Medallion Court Perris, CA 92571	**PROPOSED DECISION** Admin. Hearing No.: 92317359 LA State No.: District: Issue Code: 181 1

Case Name: SERENA LAND

Administrative Law Judge:	RENE A. QUINTANILLA
County Representative:	JON PRUITT
Authorized Representative:	NONE
Place:	RIVERSIDE
Date of County Notice:	09/28/92
Admin. Hearing Filing Date:	11/03/92-Postponed on 12/22/92.
Date of Hearing:	01/27/93
Aid Paid Pending:	Not Applicable – Denial

SUMMARY

The action of Los Angeles County under the Aid to Families with Dependent Children (AFDC) Program to

deny the claimant's request for Aid to Families with Dependent Children-Foster Care (AFDC-FC), effective September 1, 1992, is not correct and is not upheld. (181 1) [92317359]

STATEMENT OF FACT

The county maintains that they correctly took the above action because state regulations require that a child shall have been "linked" to the Federal AFDC-Foster Group (FG) Program during any of the six months before the petition for placement in foster care is filed with the juvenile court.*

The county noted that the "linkage" requirement is met if the child lived with the parent or relative *from whom removed,* within any of the six months prior to the month in which the petition was filed. The county added that the child in question, Sade L., did *not* live with her mother during any of the six months prior to the month in which the October 31, 1991 petition was filed.

The county testified that Sade had lived with her maternal granduncle, John L., since at least December 1, 1990, and that on October 31, 1991, the Los Angeles Department of Child Services (DCS) filed a petition in juvenile court to remove the care and custody of Sade *from her mother,* and that the petition was upheld. The county testified that while Sade lived with John L. she received

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* The county relies upon state regulation – Manual of Policies and Procedures (MPP) Section 45-202.313, which is cited in its entirety in the Conclusions of Law Section of the decision, infra.

AFDC-FG benefits during the period from December 1, 1990 through August 21, 1992, when he died.

The claimant, Capitola L., who is the maternal grandmother of Sade, testified that around June or July, her brother, John L., brought Sade to her because he was very ill. She testified that John L. told her that he would be back for Sade when his health improved, but that his health deteriorated and he passed away on August 2, 1992.

CONCLUSIONS OF LAW

I

Manual of Policies and Procedures (MPP) Section 45-202.31 provides as follows with regard to the federal AFDC-FC Program and the AFDC-FC "linkage" determination:

> .31 The child shall have been linked to the federal AFDC-FG/Uemployed (AFDC-FG/U) Program during the month in which the petition was filed with the juvenile court, which led to the child's placement into foster care pursuant to a detention or dispositional order. This linkage requirement is met if one of the following conditions exists during the month in which the petition was filed:
>
> .311 The child was living in the home of the parent or relative *from whom removed*, was eligible for, and received federal AFDC-FG/U.
>
> .312 The child was living in the home of the parent or relative *from whom*

removed and would have been eligible for federal AFDC-FG/U had application been made.

.314 The child was no longer living in the home of the parent or relative *from whom removed,* but would have been eligible for federal AFDC-FG/U based on that parent's or relative's home had he/she been living there and had application been made.

(a) To meet this condition, the child shall have been living with the parent or relative *from whom removed,* within any of the six months prior to the month in which the petition was filed the juvenile court, which led to the child's placement into foster care pursuant to a detention or dispositional order. (Emphasis added).

CONCLUSION:

It is held that the county action is not correct and is not upheld. While it is undisputed that the child, Sade L., did *not* live with her mother during any of the six months prior to the month in which the October 30, 1991, petition was filed with the Juvenile Court, it is held that *she received AFDC-FG* benefits during the period from December 1, 1990 through August 21, 1992. Therefore, it may not be held that she was not linked to the federal AFDC-FG Program during the period in question.

ORDER

The claim is granted.

Los Angeles County shall approve AFDC-FC benefits for the child, Sade L., effective September 1, 1992.

Los Angeles County shall issue the appropriate retroactive payment for AFDC-FC benefits effective September 1, 1992, as otherwise eligible.

jrh3029/c7693

I, Rene A. Quintanilla, hereby submit the foregoing as my proposed decision in the matter of State Hearing #92317359, and recommend its adoption as the decision of the Director of the Department of Social Services.

/s/ Rene A. Quintanilla
Administrative Law Judge

Certification Date

The preceding decision was adopted on the date stamped on page one. If you are dissatisfied with this decision, you may file a request for rehearing. A request for rehearing must be filed in writing with the Office of the Chief Administrative Law Judge of the Department of Social Services 744 P Street, MS 19-37, Sacramento, 95814 within 30 days after receiving this decision. The request should state the date the decision was received, why a rehearing should be granted, and how a rehearing would change the outcome of the decision. If you intend to present additional evidence, the request should: (1) Describe the additional evidence, (2) Show why it was not introduced originally, and (3) Explain how it affects the decision. If your rehearing request is denied or you are dissatisfied

with the result of the rehearing, you may seek judicial review in Superior Court.

You may also seek judicial review in Superior Court, with or without first requesting a rehearing. A petition may be filed in Superior Court, under the provisions of section 1094.5 of the Code of Civil Procedure, within one year after receiving this decision or the rehearing decision, whichever is later. No filing fees will be required. You may be entitled to reasonable attorney's fees and costs if the Court renders a final decision in your favor. You may contact your nearest Legal Aid Office for assistance.

Information in this decision is protected by Section 10850, Welfare and Institutions Code, which provides for the confidentiality of public social services records.

APPENDIX F

STATE OF CALIFORNIA –
HEALTH AND WELFARE AGENCY (seal)

DEPARTMENT OF SOCIAL SERVICES
744 P Street, Sacramento, CA 95814

March 26, 1992

ALL COUNTY LETTER NO. 92-33

TO: ALL COUNTY WELFARE DIRECTORS
ALL CHIEF PROBATION OFFICERS
ALL JUVENILE COURT JUDGES

SUBJECT: **HOME OF REMOVAL – FEDERAL AID TO FAMILIES WITH DEPENDENT CHILDREN-FOSTER CARE PROGRAM**

The purpose of this All County Letter (ACL) is to clarify "home of removal" and its relation to eligibility determinations under the Federal Aid to Families with Dependent Children-Foster Care (AFDC-FC) Program.

Federal and State law mandate that removal of children from their homes occurs only after a judicial determination has been made via a court order. Therefore, the court order is the document which defines from whom a child is removed.

The court order which removes the child and specifies that placement and care is vested with a specific agency will also specify from whom the child was removed. The person (or persons) listed on the court order is "the home of the parent or relative from whom removed."

To determine home of removal for the purpose of eligibility under the Federal AFDC-FC Program, Counties

should continue to look at the court order to identify from whom the child was removed. Based on the information contained in the court order, Counties can determine if the child meets the Deprivation Requirement, AFDC-FC/U Linkage Requirement, and Authority for Placement under the Federal AFDC-FC Program.

For purposes of Federal Redetermination of Deprivation (Eligibility & Assistance Standards (EAS) 45-202.12), it is the status of the parent(s) or relative(s) named on the court order that must be reviewed to determine if deprivation still exists. Please refer to ACL 90-04 and ACL 91-44 for details regarding the redetermination of deprivation process.

When determining if a child is linked to the AFDC-FG/U Program (EAS 45-202.31), the circumstances of the parent(s) or relative(s) named on the court order must be reviewed to determine if any of the necessary conditions exist in the month of petition. Please refer to ACL 91-105 for details regarding the AFDC-FG/U linkage requirement.

To determine if the child meets the Authority for Placement requirement (EAS 45-202.41), Counties must review the court order language and determine if the necessary findings have been documented in this court order.

In addition, it continues to be critical to ensure that AFDC-FC payments are not made to a child who resides in the same home with the person(s) from whom removed (via court order). If the person or person(s) from whom the child was removed moves into the home where the child is placed, AFDC-FC eligibility ceases to exist and payments must be discontinued.

If you have any questions regarding eligibility under the AFDC-FC Program, please contact your Foster Care Program Consultant at (916) 445-0813.

Sincerely,

/s/ Loren D. Suter
LOREN D. SUTER
Deputy Director
Adult & Family Services
Division

cc: CWDA

APPENDIX G

STATE OF CALIFORNIA –
HEALTH AND WELFARE AGENCY

DEPARTMENT OF SOCIAL SERVICES
744 P Street, MS 4-161 (SEAL)
Sacramento, CA 95814
(916) 323-4701

June 07, 1991

Ms. Alice Bussiere
Staff Attorney
114 Sansome Street, Suite 900
San Francisco, CA 94104-3820

Dear Alice:

Bob Campbell has asked me to reply to your letter of May 10, 1991. In that letter, you have asked if the Department has received any written confirmation from the federal Department of Health and Human Services (DHHS) about the change in federal policy on the "home of removal."

As you know, this issue had been the subject of recent federal audits. The federal position defined "home of removal" as the home in which the child last lived before the petition for dependency was filed, rather than the home of the person legally responsible for the child. As a result of our responses to the federal audits, the federal position on this was changed. We were assured at the time of agreement to the change that information about this shift in position would be soon provided to the states.

Unfortunately, we have not yet received written confirmation of this change from DHHS, although it has been well over a year since the issue was resolved. We will be sure to notify you when we do receive something on this question.

If you have any questions or concerns about this issue, please call me at (916) 323-4701.

Sincerely,

/s/ Barbara G. Elbrecht
BARBARA G. ELBRECHT
Staff Attorney

cc: Nancy Remley
Foster Care Program Bureau

(logo)
NATIONAL CENTER FOR YOUTH LAW

May 10, 1991

[Letterhead Omitted In Printing]

Robert C. Campbell
Department of Social Services
744 P Street
Sacramento, California 95814

Dear Bob:

Last fall, by a letter dated November 7th, a copy of which is enclosed, you advised us that you expected a change in the federal policy concerning IV-E eligibility criteria and the issue of "home of removal." Would you please advise me whether you have received any confirmation of the federal policy change.

Very truly yours,

Alice Bussiere

AB:am
Enclosure

cc: Foster Care Benefits Advocates

(3)

No. 97-727

Supreme Court, U.S.
FILED
DEC 8 1997
CLERK

In The

Supreme Court of the United States

October Term, 1997

ELOISE ANDERSON, as Director of the California Department of Social Services; and the CALIFORNIA DEPARTMENT OF SOCIAL SERVICES,

Petitioners,

v.

CAPITOLA LAND, MARIA LOPEZ and JEAN MCCRUMBY,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal Of California, Second Appellate District

PETITIONERS' REPLY BRIEF

DANIEL E. LUNGREN,
Attorney General of California
ROBERT L. MUKAI,
Chief Assistant Attorney General
CHARLTON G. HOLLAND III,
Assistant Attorney General
JOHN H. SANDERS,
Supervising Deputy Attorney General
*ROBIN T. GERTLER,
CA Bar. No. 128413
Deputy Attorney General

300 S. Spring Street, Room 500
Los Angeles, California 90013
Telephone: (213) 897-2439

Counsel for Petitioners

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

24 pp

TABLE OF CONTENTS

Page

ARGUMENT 1

I WHETHER OR NOT THERE PRESENTLY EXISTS A STATE OR FEDERAL COURT DECISION CONTRARY TO THE COURT OF APPEAL DECISION IS NOT THE ONLY CONSIDERATION IN DETERMINING THE APPROPRIATENESS OF SUPREME COURT REVIEW..... 1

II THE COURT OF APPEAL'S DECISION HOLDING THAT A CHILD IS ELIGIBLE FOR AFDC-FC BENEFITS AS LONG AS THE CHILD RECEIVES AFDC IN THE FOSTER CARE HOME WILL RESULT IN SIGNIFICANT FISCAL CONSEQUENCES FOR THE STATE OF CALIFORNIA..... 2

III THE FACT THAT CALIFORNIA'S INTERPRETATION OF 42 U.S.C. § 672(a)(4) IS CONSISTENT WITH FEDERAL POLICY IS ANOTHER COMPELLING REASON FOR GRANTING CERTIORARI 4

IV RESPONDENTS AGAIN MISCONSTRUE THE LEGISLATIVE HISTORY BEHIND 42 U.S.C. SECTION 672..... 8

V RESPONDENTS' CLAIM THAT THE COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES DELAYED IN FILING THE PETITIONS HAS NO BEARING ON THE CASES AT ISSUE 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

American Federation of Musicians of the United States and Canada et al. v. Wittstein, 379 U.S. 171 (1964) 1

American Hospital Assn. v. NLRB, 499 U.S. 606 (1991) 6

California v. Taylor 353 U.S. 553 (1957) 9

Chevron U.S.A. v. Nat. Resources Def. Council, Inc., 467 U.S. 837 (1984) 5, 6

Chisholm v. FCC, 538 F.2d 349, cert. denied, 429 U.S. 890 (D.C. Cir. 1976) 6

Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469 (1992) 3

Kolovrat et al. v. Oregon, 366 U.S. 187 (1961) 1

Miller v. Youkim, 440 U.S. 125 (1979) 2

NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974) 6

Pennington v. Didrickson, 22 F.3d 1376 (7th Cir. 1994) 7

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) 5

Tovar v. U.S. Postal Service, 3 F.3d 1271 (9th Cir. 1993) 6

Yang v. INS, 79 F.3d 932 (9th Cir. 1996) 6

STATUTES

5 United States Code

§ 551,(5), (7) 6

TABLE OF AUTHORITIES – Continued

Page

42 United States Code

§ 606(a) 3

§ 671 4

§ 672 ..... 2, 4, 7, 8

§ 672(a) 3

§ 672(a)(4) 2, 3, 4, 5, 7, 9

§ 672(a)(4)(B)(ii) 9

45 Code of Federal Regulations

§ 1355.20 6

§ 1355.21 6

PETITIONERS' REPLY BRIEF

Petitioners Eloise Anderson, as Director of the California Department of Social Services and the California Department of Social Services (hereinafter referred to as "petitioners") hereby file their reply to the Brief in Opposition to Petition for Writ of Certiorari filed by Capitola Land, Maria Lopez and Jean McCrumby (hereinafter referred to as "respondents").

ARGUMENT

I

WHETHER OR NOT THERE PRESENTLY EXISTS A STATE OR FEDERAL COURT DECISION CONTRARY TO THE COURT OF APPEAL DECISION IS NOT THE ONLY CONSIDERATION IN DETERMINING THE APPROPRIATENESS OF SUPREME COURT REVIEW

Respondents argue that certiorari is premature because there are no federal or state court decisions which are contrary to the decision reached by the California Court of Appeal. However, the existence of a contrary court decision is not the only consideration in determining the appropriateness of Supreme Court review. It is well established that decisions involving the construction and application of a federal statute may be reviewed on certiorari where a sufficiently important federal question is presented, even though no contrary decision exists. See *Kolovrat et al. v. Oregon*, 366 U.S. 187, 191 (1961).

In addition, certiorari is appropriate where the federal question presented is "an important one of first impression." *American Federation of Musicians of the United*

States and Canada et al. v. Wittstein, 379 U.S. 171, 175 (1964). As the instant case involves the interpretation and construction of an important federal question involving the eligibility requirements of the federal Aid to Families with Dependent Children-Foster Care ("AFDC-FC") Program set forth at 42 U.S.C. § 672, and since the Court of Appeal's decision is totally contrary to a plain reading of the federal statute, the legislative history and federal AFDC policy, the granting of certiorari is warranted in this case.

II

THE COURT OF APPEAL'S DECISION HOLDING THAT A CHILD IS ELIGIBLE FOR AFDC-FC BENEFITS AS LONG AS THE CHILD RECEIVES AFDC IN THE FOSTER CARE HOME WILL RESULT IN SIGNIFICANT FISCAL CONSEQUENCES FOR THE STATE OF CALIFORNIA

Respondents erroneously state that "a relatively small number of children" – only those children receiving AFDC with related foster care relatives – will be affected by the Court of Appeal's decision. First, petitioners do not distinguish between children living with relatives in foster care and those living with non-relatives in determining AFDC-FC eligibility. See *Miller v. Youkim*, 440 U.S. 125, 128 (1979). Rather, petitioners maintain that in order to meet the linkage requirement, the child must have been eligible for AFDC in the home of removal and must have lived in that home within six months of the initiation of the petition, regardless of whether the child is living with a relative or nonrelative while in foster care and regardless of the child's eligibility for AFDC in the foster care home. 42 U.S.C. § 672(a)(4). Of the

approximately 105,000 children in foster care, 18,200 of these children are currently receiving Aid to Families with Dependent Children/Temporary Assistance for Needy Families benefits. Appendices A and B.[1] A significant portion of these children who were not eligible for AFDC-FC under the Department's current regulations will now be eligible for such benefits pursuant to the Court of Appeal's decision.[2]

Based upon the Court of Appeal's interpretation of 42 U.S.C. § 672(a)(4), which does not consider the language set forth in 42 U.S.C. § 672(a), respondents argue that the linkage requirement has been met because they received AFDC with the foster caretaker prior to the month the juvenile court petition was filed. However, 42 U.S.C. § 672(a) clearly focuses on children who will lose AFDC eligibility when they are removed from their homes and provides for federal foster care payments to children who would be eligible for AFDC " . . . but for [their removal

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[1] The original declarations of Patric B. Ashby and Eric Fujii are attached to petitioners' Application for Stay, which was denied by the Supreme Court on October 28, 1997.

[2] Respondents argue that the fiscal impact to the State of California cannot be raised before the United States Supreme Court because this issue was not raised in the lower courts. However, the fiscal impact to the State of California as a result of being out of compliance with federal policy was raised at every level of the judiciary. In addition, the fiscal impact caused by the Court of Appeal's decision was raised before the California Supreme Court. Pet., App. 34-36. Furthermore, it is well established that a writ of certiorari may be granted to resolve an issue which may potentially affect a large number of claimants even if it was not raised below. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992).

from the home of a relative (specified in section 606(a) (as so in effect) of this title), if [the requirements set forth in subsections (a)(1) through (a)(4) are met]." Once this subsection of section 672 is read with the isolated portion relied upon by respondents and the Court of Appeal, it is clear that the Court of Appeal's decision is contrary to a plain reading of the federal statute.

Congress intended only for those children who meet all the requirements set forth in 42 U.S.C. § 672 to be eligible for federal foster care benefits. Congress has also made it clear that should a state provide benefits to claimants who do not meet the eligibility requirements, the state is at risk of losing federal funding. 42 U.S.C. § 671. The Court of Appeal's holding that children are eligible for AFDC-FC benefits simply because they receive AFDC while in foster care requires the state to pay out the higher AFDC-FC rate to thousands of children who do not meet the express terms of the federal statute. Furthermore, the Court of Appeal's decision places the state at risk of losing federal funding for this program. Respondents' contention that the Court of Appeal's decision will not have a major fiscal impact on the State of California is therefore devoid of merit.

III

THE FACT THAT CALIFORNIA'S INTERPRETATION OF 42 U.S.C. § 672(a)(4) IS CONSISTENT WITH FEDERAL POLICY IS ANOTHER COMPELLING REASON FOR GRANTING CERTIORARI

In the present case, the language set forth in the statute establishes that AFDC eligibility is based upon the

home of removal and that the child must have lived in the home of removal within six months of the filing of the petition removing the child from that home. However, should the court determine that the statute is silent or ambiguous with regard to the linkage requirement set forth in 42 U.S.C. § 672(a)(4), it is appropriate for the Court to defer to the expertise of the administrative agencies charged with administrating the foster care program. *Chevron U.S.A. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837, 843-844 (1984); see also *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969). As stated by the Court in *Chevron*:

> We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations 'has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations. [Citations].' *Id.*, at p. 844.

In arguing that deference should not be given to the expertise of the United States Department of Health and Human Services ("DHHS"), the federal agency charged with administering the foster care program, respondents argue *Chevron* is not applicable because in *Chevron*, the agency's position was embodied in a formal regulation,

whereas the present cases involve an administrative decision.[3] However, the distinction made by respondents is specious.

As with *Chevron*, what is at issue in the instant cases is the interpretation of a federal statute by the agencies charged with its administration. It is well established that administrative agencies, in carrying out this duty, have discretion to proceed either by rulemaking or by adjudication. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 292-293 (1974); see also *American Hospital Assn. v. NLRB*, 499 U.S. 606, 611-612 (1991); *Yang v. INS*, 79 F.3d 932, 936 (9th Cir. 1996.)[4] In the present case, the position of DHHS regarding the linkage requirement is clearly set forth in its administrative decisions resulting from its adjudicatory process. Respondents' claim that the position of DHHS regarding the linkage requirement was required to be embodied in a formal regulation in order for the principle of deference to apply is therefore erroneous.[5]

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[3] Pursuant to 45 C.F.R. §§ 1355.20 and 1355.21, the United States Department of Health and Human Services is the federal agency charged with administering Titles IV-E and IV-B of the Social Security Act.

[4] This principle applies even where adjudication is used to announce new policy after years of contrary precedent. *Chisholm v. FCC*, 538 F.2d 349, 364-366, 429 U.S. 890 (D.C. Cir. 1976), cert. denied. The term " 'rule making' means agency process for formulating, amending, or repealing a rule." The term 'adjudication' means agency process for the formulation of an order." 5 U.S.C. § 551(5), (7).)

[5] In addition, respondents' reliance upon *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1277 (9th Cir. 1993) for the proposition that *Chevron* does not apply where the agency adopted "a regulation in a manner which did not allow for

Petitioners maintain that 42 U.S.C. § 672(a)(4) bases AFDC eligibility in the home of removal and requires the child to have lived in the home of removal within six months of the initiation of the petition removing the child from the home.[6] As previously argued, this interpretation is consistent with a plain reading of 42 U.S.C. § 672. However, should the Court find that section 672 is silent or ambiguous with regard to the linkage requirement,

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public comment" is misplaced since DHHS has chosen to proceed by way of adjudication, rather than by way of rulemaking. Similarly, *Pennington v. Didrickson*, 22 F.3d 1376 (7th Cir. 1994), is inapposite to the instant cases. That case held the principle of deference should not be applied where the agency's position is not supported by regulations, rulings *or* administrative practice. *Id.*, at p. 1383. Therefore, these cases have no applicability to the cases at issue.

[6] Respondents claim that Appendix G attached to their opposition establishes that, in 1991, both the federal agency and petitioners "apparently" agreed with respondents' interpretation of section 672 that AFDC linkage is based upon AFDC eligibility with whom the child lives with when the removal petition is filed. However, this letter is taken totally out of context. At the time this letter was written, petitioners sought guidance from the federal government regarding the home of removal where a child was placed in a foster care home on a temporary basis prior to the filing of the petition and then placed in a subsequent foster care home. At no time has either the California Department of Social Services or the United States Department of Health and Human Services maintained that the home in which the child lives when the petition is filed is the home with which AFDC linkage is to be established.

deference to the interpretation reached by the administrative agencies charged with the administration of the federal foster care program is totally appropriate in the instant cases.[7]

IV

RESPONDENTS AGAIN MISCONSTRUE THE LEGISLATIVE HISTORY BEHIND 42 U.S.C. SECTION 672

Respondents' argument that its position is supported by the Social Security Amendment of 1961 is based upon the false premise that, in 1961, federal funding for AFDC-FC was available for all children receiving AFDC, even if the child did not live in the home of removal. However, this contention is a total misunderstanding of the legislative history.

A review of the legislative history establishes that in 1967, the Social Security Act was amended to provide funding to those children who were not living in the home of removal at the time the petition was filed, but who had lived there within six months of the filing of the petition, and to those children who had not actually received AFDC, but were eligible for AFDC. Pet., App.

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[7] Respondents also argue that the federal agency's decision conflicts with All County Letter Number 92-33 issued by petitioners. Opp., App. F. However, a review of All County Letter Number 92-33 reveals that its purpose is to instruct the various counties to look at the name set forth in the court order in order to determine who is the relative from whom the child is removed. Neither agency has ever based AFDC eligibility for purposes of meeting the linkage requirement with the foster parent the child is living with at the time the petition is filed, as argued by respondents. Pet., App. 98.

71-72. Prior to that time, federal funding for AFDC-FC was only available to children who lived in home of removal at time petition was initiated and actually received benefits. Respondents' argument that the six month period set forth in 42 U.S.C. § 672(a)(4)(B)(ii) is irrelevant if the child is receiving AFDC in the foster care home is not supported by the legislative history.

V

RESPONDENTS' CLAIM THAT THE COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES DELAYED IN FILING THE PETITIONS HAS NO BEARING ON THE CASES AT ISSUE

Respondents argue pursuant to *California v. Taylor*, 353 U.S. 553, 557, n.2 (1957), issues or questions not raised or resolved in the lower court cannot be raised before the United States Supreme Court. However, respondents argue in their opposition that the County Department of Children and Family Services improperly delayed in filing the removal petitions.

In both the *Land* and *Lopez* cases, respondents never raised any wrongdoing on the part of the county at the trial court level. In addition, at oral argument at the California Court of Appeal, respondents' attorney informed the Court that it need not resolve the issue of whether the county improperly delayed in filing the petitions in these cases and that the Court could limit its decision to the proper interpretation of 42 U.S.C. § 672(a)(4). Furthermore, respondents failed to raise this as an issue to be resolved before the California Supreme

Court. Accordingly, respondents cannot raise the propriety of the county's actions in filing the removal petitions at the present time.

CONCLUSION

Accordingly, for the foregoing reasons, petitioners respectfully pray that a writ of certiorari issue to the California Court of Appeal, Second Appellate District, in the case at bar.

DATED: December 5, 1997

Respectfully submitted,

DANIEL E. LUNGREN,
Attorney General of the
State of California
CHARLTON G. HOLLAND III,
Assistant Attorney General
JOHN H. SANDERS,
Supervising Deputy
Attorney General
*ROBIN T. GERTLER,
Deputy Attorney General
Attorneys for Petitioner
**Counsel of Record*

TABLE OF CONTENTS

Page

APPENDICES

A. Declaration of Patric B. Ashby in Support of Application for Stay..... App. 1

B. Declaration of Eric Fujii in Support of Application for Stay..... App. 6

APPENDIX A

DECLARATION OF PATRIC B. ASHBY IN SUPPORT OF APPLICATION FOR STAY

I, PATRIC B. ASHBY, declare and state as follows:

1. The following matters stated in this declaration are true to the best of my personal knowledge. If called as a witness, I would truthfully and competently testify consistent with the following:

2. I am the Chief of the Foster Care Branch of the California Department of Social Services ("Department"). The Foster Care branch administers the Aid to Families with Dependent Children-Foster Care ("AFDC-FC") Program set forth in 42 U.S.C. § 672. As part of my duties as Chief of the Foster Care Branch, I am responsible for supervising the implementation of federal and state laws relating to the AFDC-FC Program, formulating state regulations and setting policies for the payment of AFDC-FC benefits to those individuals meeting the eligibility requirements set forth in 42 U.S.C. § 672.

3. The California Department of Social Services administers two aid programs on behalf of eligible children who have been removed from the home of a parent or relative as the result of a court dependency order or voluntary placement agreement and are now living with caretaker relatives, the Aid to Families with Dependent Children ("AFDC")/Temporary Assistance for Needy Families ("TANF") Program and the AFDC-FC Program.[1]

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[1] The federal AFDC program has been replaced by the Temporary Assistance for Needy Families ("TANF") Program.

Children who meet the eligibility requirements set forth in Title IV-E of the Social Security Act, codified at 42 U.S.C. § 672, are paid AFDC-FC benefits. Children who do not meet the requirements set forth in 42 U.S.C. § 672 may be eligible for AFDC/TANF benefits. The AFDC-FC benefits are paid at a higher monthly rate than the AFDC/TANF benefits.

4. The California Department of Social Services enacted regulations implementing the AFDC-FC Program based upon its interpretation of 42 U.S.C. § 672. The Department's regulations are set forth in the California Department of Social Service's Manual of Policies and Procedures ("MPP"). As a condition of eligibility for federal AFDC-FC benefits, the Department's regulations require the child to be linked to the AFDC Program during the month the petition leading to the child's placement in foster care was filed or the voluntary placement agreement was signed. MPP § 45-202.31. Pursuant to the Department's regulations, this requirement is met if the child is eligible for AFDC with the parent or relative from whom removed during the month the petition for the dependency order was initiated or the voluntary placement agreement was signed and if the child lived with that parent or relative within six months of the initiation of the petition. MPP § 45-202.31 through MPP § 45-202.313.

Pub.L. 104-193, Title I, §§ 103(a)(1), 116, Aug. 22, 1996, 110 Stat. 2112, 2181. The TANF Program is codified in 42 U.S.C. § 601. California's program will continue to be called the "AFDC" Program until January 1, 1998, when new legislation becomes effective. However, the federal funding source for the state's program is the TANF Program.

5. Pursuant to 42 U.S.C. § 671, in order to receive federal funding, the California Department of Social Services is required to maintain and implement a state plan approved by the United States Department of Health and Human Services which meets the requirements set forth in 42 U.S.C. § 672. The Department's regulations implementing the AFDC-FC program are included in California's plan, which was approved by the United States Department of Health and Human Services.

6. I am familiar with the California Court of Appeal's Decision in *Land, et al. v. Anderson*, Court of Appeal Case Number B094688. In the *Land* case, the Court held that MPP §§ 45-202.311 through 45-202.313 misinterpreted 42 U.S.C. § 672(a)(4) and that the federal statute does not require linkage to the home of removal as a condition of eligibility for federal AFDC-FC benefits. The Court of Appeal further held that a child living with a caretaker relative who is eligible for AFDC in the month the petition is initiated is also eligible for AFDC-FC benefits.

7. Pursuant to the *Land* decision, most children who are not eligible for AFDC-FC benefits under the Department's current regulations will be eligible for such benefits. The Estimates Bureau of the California Department of Social Services has estimated that approximately 18,200 children currently receiving AFDC benefits will be eligible for AFDC-FC benefits pursuant to the *Land* decision. This increased cost to the State of California is estimated to exceed $50,000,000 in the first year alone if federal financial participation is not available. Should petitioners ultimately prevail on the merits, there is currently no regulation in effect which would permit the

State of California to recoup any increased benefit payments made pursuant to the *Land* decision.

8. Implementation of the *Land* decision will create fiscal uncertainty for the state of California, because it is unknown whether federal funding will be withheld for those children eligible under the *Land* decision. Both the United States Department of Health and Human Services, as well as other states, require the child to be eligible for AFDC/TANF benefits in the home of removal and require the child to have lived in the home of removal within six months of the initiation of the juvenile court petition or voluntary placement agreement.

9. The Court of Appeal's decision will also create a significant administrative burden at the state and county levels since the entire eligibility process will have to be restructured and new eligibility regulations implemented in order to be in compliance with the Court of Appeal's mandates.

10. The Department of Social Services will be filing a petition for writ of certiorari in the *Land* case. Should the Department prevail on the merits, each of the administrative activities involved in implementing the decision will have to be undertaken twice, first to implement the Court of Appeal's decision, then to undo the implementation of the Court of Appeal's decision. In addition, the increased benefit payments made pursuant to the Court of Appeal's decision, as well as the administrative time and costs expended in developing and implementing a new eligibility determination process, cannot be recovered by the state. Accordingly, petitioners respectfully request that the Court of Appeal's decision be stayed

pending a final disposition on the petition for writ of certiorari.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 16th day of October, 1997.

PATRIC B. ASHBY
Declarant

APPENDIX B

DECLARATION OF ERIC FUJII IN SUPPORT OF APPLICATION FOR STAY

I, Eric Fujii declare and state as follows:

1. I am the Chief of the Estimates Branch of the California Department of Social Services ("Department"). As Chief of the Estimates Branch, I am responsible for the development of the local assistance budget for programs administered by the Department, including the Aid to Families with Dependent Children-Foster Care ("AFDC-FC") Program. As Chief of the Estimates Branch, I have personal knowledge of the following and could competently testify thereto, if called as a witness.

2. I am familiar with the California Court of Appeal's decision in *Capitola Land et al. v. Eloise Anderson*, Court of Appeal Case Number B094688. This decision expands the eligibility of children placed with relatives for AFDC-FC benefits, which are paid out at a higher rate than the Aid to Families with Dependent Children ("AFDC")/Temporary Assistance to Needy Children ("TANF") benefits. The Department estimates that the immediate increase in the number of children potentially eligible for AFDC-FC benefits by the *Land* decision is approximately 18,200. Utilizing data reported by the counties to the Foster Care Information System, this estimate reflects the number of children currently residing with relatives and receiving AFDC/TANF benefits.

3. The monthly AFDC/TANF benefit payment is approximately $206.90 for each child. However, the average AFDC-FC payment is approximately $572.73 per

month for each child. The total increased cost of implementing the *Land* decision could therefore exceed $125,000,000. Approximately $25,000,000 of the total amount would be paid from the state's General Fund, provided that the Department receives federal financial participation. Without federal financial participation, the General Fund liability could exceed $50,000,000.

4. In addition, the increased cost to the local governments is estimated to exceed $37,000,000, assuming federal financial participation is available. In the event federal financial participation cannot be claimed, the increased cost to the counties is estimated to be $75,000,000.

5. Implementation of the *Land* decision will also create a significant administrative burden at the state and county levels. State representatives will have to amend existing policy directives and regulations governing AFDC-FC eligibility determinations. The provisions set forth in the state's Title IV-E of the Social Security Act Plan will also have to be modified.

6. In addition, as initial eligibility determinations for the AFDC-FC program are made at the county level, the county welfare departments will have to provide instruction, training and technical assistance to its representatives in order to comply with the Court of Appeal's decision. Each county will be required to identify the exact number of cases affected by the *Land* decision and then review each case identified. There will be significant costs associated with this process, the exact amount depending upon the case search method utilized. This identification process includes an electronic search of all

cases in which foster children are living with relatives and may involve coordination with the California Department of Social Services Information Services Bureau. There are approximately 47,000 cases statewide. As part of the identification process, non-automated counties will be required to conduct a case by case search of cases that cannot be identified through the Department's computer system. There are approximately 27,000 such cases statewide.

7. After identifying the children impacted by the *Land* decision, counties will be required to redetermine the eligibility of these children using the new requirements set forth in the *Land* decision. For new cases, counties will have to perform two separate eligibility determinations. First, the county will have to determine the child's eligibility in the home of removal using current regulations. If the child is not eligible under the Department's current regulations, the county will then have to redetermine the child's eligibility based upon the home of the caretaker relative.

8. If a child is determined to be eligible under the rules imposed by the *Land* decision, the case must be transferred from the AFDC Program to the AFDC-FC Program. Based upon the Department's estimates, which assumes one hour per case and an eligibility worker cost of $50.24, the cost to process 18,200 cases would be approximately $900,000.

9. In addition, implementing this decision would also significantly increase the number of eligibility determinations that county representatives would be required to perform on an ongoing basis. Children receiving

AFDC/TANF benefits are reassessed annually. However, children receiving AFDC-FC benefits are reassessed every six months. Assuming one-half hour per case, the administrative cost increase associated with this activity is estimated at $450,000.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 15th day of October, 1997.

ERIC FUJII
Declarant